

# LABOR RIGHTS, GLOBALIZATION AND INSTITUTIONS: THE ROLE AND INFLUENCE OF THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT

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INTRODUCTION .....	770
I. THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT.....	774
A. <i>History of the OECD</i> .....	774
B. <i>OECD Activities</i> .....	776
1. Rich Man's Club .....	776
2. Management Consulting .....	777
3. Legislation .....	779
C. <i>OECD Structure</i> .....	782
D. <i>BIAC and TUAC</i> .....	785
II. THE OECD AND PROMOTION OF LABOR RIGHTS .....	788
A. <i>OECD Guidelines for Multinational Enterprises</i> .....	788
B. <i>The Labour Standards Study</i> .....	796
C. <i>Accession of South Korea</i> .....	800
III. THE OECD AND GLOBALIZATION .....	804
A. <i>A Case Study of the Multilateral Agreement     on Investment (MAI)</i> .....	805
1. A Brief History of Investment Treaties.....	806
2. Movement Toward Negotiating an MAI at the OECD.....	810
3. The Negotiations.....	814

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4.	The Tide Turns: Concerted, International Opposition by Civil Society.....	817
5.	Lessons from the MAI .....	828
IV.	INSTITUTIONAL ANALYSIS.....	831
A.	<i>Creation of Communities of Influence</i> .....	832
B.	<i>Conditional Agenda-Setter</i> .....	835
1.	IGO Forum Shopping.....	838
2.	Setting Other IGOs' Agendas.....	839
	CONCLUSION—CHALLENGES FOR THE FUTURE .....	842

## INTRODUCTION

As this Introduction is completed, a single news story has dominated the newspapers and networks for the last few weeks: the granting of permanent normal trading relations (PNTR) to China, a necessary step to its admission in the World Trade Organization (WTO). Lobbying on behalf of granting PNTR, the Clinton administration and a range of business interests have swarmed over Capitol Hill, eagerly describing vast new markets for goods. The key opponent of the legislation has been organized labor, gravely depicting the consequences of vast new opportunities for low-cost production. Perhaps surprisingly, organized labor's public opposition to PNTR has been premised not on loss of jobs in the United States but on concerns over core labor rights. As AFL-CIO President John Sweeney has declared, "until there is freedom of speech and freedom of association in China, until there is freedom of religion and freedom to join unions in China, there can be no permanent free trade agreement with China."<sup>1</sup>

Despite the media's current obsession with China and PNTR, if one looks back over the last decade this latest political clash seems little different from the charged debate in 1992 over NAFTA, in 1995 over approval of the Uruguay Round, in 1998 over fast track authority for President Clinton, and last November in the Seattle WTO ministerial negotiations over a millennial trade round. The conflict will likely be joined once again in a few short years when the Free Trade Area of the

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1. Carter Young, *In the Bag? Odd Coalition Pushes China Trade Deal Toward Passage*, ABCNews.com, at <http://abcnews.go.com/sections/politics/DailyNews/PNTR000522.html> (May 22, 2000). One might question whether labor's core concern is solidarity with Chinese workers rather than the potential loss of U.S. jobs, but at a basic level the two meld into the same call for level playing fields as a precondition for PNTR. Amidst electioneering drama prior to the final vote, the House of Representatives ended up comfortably approving PNTR by a vote of 237 to 197. Ian Christopher McCaleb, *House Approves China Trade Pact*, CNN.com, at <http://www.cnn.com/2000/ALLPOLITICS/stories/05/24/china.trade/index.html> (May 24, 2000).

Americas agreement comes up for a vote. Each of these clashes has concerned a superficially different issue, perhaps, but the net effect has been a variation on a common theme. Each has featured the same antagonists and the same overarching concern: the destabilizing social effects of globalization.

The almost blinding pace of trade and investment growth over the last decade, driven by concerted international efforts to remove domestic barriers to the flow of goods, services, and capital, has brought about an unprecedented global marketplace. To be sure, the potential of growing international commerce remains alluring. With increased generation of wealth, it stands to reason that living standards will improve as well. Witness the familiar refrain of trade advocates and the Clinton administration that a rising tide lifts all boats.<sup>2</sup> But increased economic activity can come at a social cost, as well, ranging from job loss and depressed wages to lower levels of labor, environmental and social protections.<sup>3</sup>

Thus, coincident with growing global markets has been a growing concern of groups within civil society over the social impacts of economic liberalization. As realization of the scope of potential costs has increased, environmental, labor, and other citizen groups have either directly opposed further economic liberalization or, as a complementary strategy, stepped up calls for explicit linkage between economic liberalization and protection of public interests.<sup>4</sup> Hence, labor and

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2. It certainly has been a spring tide in the United States. As U.S. Trade Representative Charlene Barshefsky contends,

[T]he opening of world markets has helped spark a 55% expansion of American goods and services exports since 1992, to a record total of \$958.5 billion last year. . . . [W]e have seen \$2.1 trillion in economic growth, during the longest economic expansion in American history; the creation of nearly 21 million new jobs; a \$400 billion expansion in our manufacturing industry; wages for non-supervisory workers up 6.5%; and broadly shared benefits, with poverty rates at the lowest levels since 1979, and unemployment touching 4% in January, with record lows for women, African-Americans and Hispanics.

Ambassador Charlene Barshefsky, United States Trade Representative, U.S. Trade Policy and the Trading System, Address at the Brandeis University Graduate School of International Economics and Finance (Apr. 13, 2000), available at [http://www.ustr.gov/speech-test/barshefsky/barshefsky\\_79.pdf](http://www.ustr.gov/speech-test/barshefsky/barshefsky_79.pdf), at 5 (last modified Apr. 18, 2000).

3. For a broad-ranging view on the threats posed by globalization, see Russell Mokhiber and Robert Weissman, *10 Reasons to Dismantle the WTO*, at [http://www.infoshop.org/octo/wto\\_reasons.html](http://www.infoshop.org/octo/wto_reasons.html) (last modified Dec. 10, 1999).

4. Lawrence Krause & Joseph Nye, *Reflections on the Economics and Politics of International Economic Organizations*, 29 INT'L ORG. 323, 325 (1975) ("As the integration of markets has progressed, immobile groups in societies, including large segments of labor, have pressed for governmental protection to redress their relative disadvantage in the competition with transnationally mobile competitors."). A large number of nongovernmental organizations (NGOs) have called for a new approach to globalization that looks beyond increased commerce, but there is a significant difference in tactical approaches. Some NGOs have called for

environmental side agreements have been created as part of the NAFTA deal to provide a strategic social counterweight to the growth in commerce promised by pro-trading interests.<sup>5</sup> The need for and appropriate breadth of safeguards have become key issues in both domestic and international fora, determining the extent to which international regulatory regimes explicitly create protections against encroachment on labor, social or environmental values.

In the labor context, this debate has focused on whether liberalization requires corresponding protection of labor rights and, if so, for *which* rights and at *what level* of protection. The broad landscape of the trade-labor conflict is well known, and has been much discussed.<sup>6</sup> In exploring the promotion of labor rights by international governmental institutions (IGOs), scholars have largely focused on the International Labor Organization (ILO), the WTO, and the European Union. Such a focus is entirely fitting, for it is here that many of the priorities are set, rights articulated, linkages fixed, and protections created.

In this well-trodden field of study, though, another key IGO player has been overlooked. Little scholarly consideration has been given to the role of the Organization for Economic Cooperation and Development (OECD). Perhaps this inattention is to be expected since, in contrast to IGOs in the U.N. system, the ILO, or the WTO, the OECD has been a remarkably low-profile institution. In the United States, few people know the organization exists much less what it does. Even those who know of the OECD focus on its well-known activities in economic spheres, rarely thinking of its role in relation to social issues, much less to labor rights.<sup>7</sup> Indeed, there is remarkably little focused political science or legal scholarship on the OECD as an institution in *any* context.<sup>8</sup>

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the dismantling of the WTO and international financial institutions (such as the anarchists in the website cited above), while the international labor movement has taken a more pragmatic reform approach focusing on the need to re-structure trade and investment agreements.

5. For a history of the NAFTA side agreements, see DAVID HUNTER, JAMES SALZMAN, & DURWOOD ZAELKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 1245-58 (1998).

6. See, e.g., Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime: A Historical Overview*, 126 *INT'L LAB. REV.* 565 (1987); Janelle Diller & David Levy, *Child Labor, Trade and Investment Toward the Harmonization of International Law*, 91 *AM. J. INT'L L.* 663 (1997); Laura Ho, Catherine Powell, & Leti Volpp, *(Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 *HARV. C.R.-C.L. L. REV.* 383 (1996).

7. The one area in which notice has been taken of the OECD and labor rights has been the OECD Guidelines. See discussion *infra* Section II.A. The focus there, though, has been on the text and interpretation of the Guidelines rather than the structure and institutional capacity of the OECD.

8. Andrew Moravcsik's study of the OECD Export Credit Arrangement provides an excellent analysis of negotiations conducted at the OECD, but his focus is on regime formation and maintenance rather than on the OECD, itself. Andrew Moravcsik, *Disciplining Trade*

This oversight is unfortunate because the OECD has played, and continues to play, an important role in shaping the architecture of global governance not only in international commerce but in non-economic domains, as well. This has been achieved through directed research, lawmaking, and, less directly, through the creation of communities of influence that set the agendas of international policy. In assessing the growth of transgovernmental networks, for example, Professor Anne-Marie Slaughter has predicted that, in stark contrast to the U.N. constellation of institutions, “[t]he next generation of international institutions is . . . likely to look more like the Basel Committee [composed of 12 central bank governors] or, more formally, the Organization of Economic Cooperation and Development, dedicated to providing a forum for transnational problem-solving and the harmonization of national law.”<sup>9</sup> Surely an organization that potentially sets the standard for the next generation of IGOs warrants serious study.

This Article has four sections. The first recounts the history of the OECD, from its creation as the overseer of the Marshall Plan<sup>10</sup> to its current prominence as global economic analyst, and explains its operations. The second section explores its influence on the development of labor rights, examining the well-known OECD Guidelines for Multinational Enterprises, publications on trade and labor by the Employment, Labor and Social Affairs Directorate, and the events surrounding South Korea’s accession to the OECD. Each of these activities, though quite different from one another (and, in combination, very different from the activities of other IGOs), provided important spurs to the articulation and development of core labor rights. Part III presents a detailed case study of the failed negotiations at the OECD over the Multilateral Agreement on Investment (MAI). The case study provides insight both into an important event in the march toward globalization and into the role the OECD can meaningfully play in formally linking trade and labor rights.

While the OECD’s reports, recommendations, and decisions have been discussed in a wide range of scholarship, little has been written on

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*Finance: The OECD Export Credit Arrangement*, 43 INT’L ORG. 173 (1989). Rob Housman’s 1994 article briefly discusses the restrictions on NGO participation at the OECD. Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 CORNELL INT’L L.J. 699, 716–18 (1994).

9. Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.–Oct. 1997, at 183, 196 (1997).

10. The Marshall Plan was a financial assistance package from America to restore the economic infrastructure of Europe following World War II. See Economic Cooperation Act of 1948 (Marshall Plan), Pub. L. No. 80-472, 62 Stat. 137, available at <http://www.nara.gov/exhall/featured-document/marshall/marshall.html> (last visited Oct. 14, 2000).

the institution itself. The different empirical analyses in Parts I, II, and III combine to inform the institutional analysis in Part IV and its findings are relevant to the range of the OECD's activities, from environmental protection and trade to agriculture and transport policy. In reviewing instances in which the OECD has proved most effective and assessing its relative strengths and weaknesses in comparison to competing IGOs, this section draws from international relations scholarship and focuses on the OECD's two distinguishing assets—its role in creating communities of influence and its influence as a conditional agenda-setter.

The concluding section considers the future of the OECD, proposing how it can better meet the twin challenges posed by globalization—OECD membership and meaningful engagement of civil society. It is hoped that the Article's exploration of the OECD's influence on labor rights will provide a broad foundation for future work on other aspects of the institution, informing research on the operations, capacity, and potential of the OECD in a very different world than one envisaged by the organization's architects over fifty years ago.

## I. THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT

### A. *History of the OECD*

The predecessor to the OECD, the Organization for European Economic Cooperation (OEEC), was created in April 1948 amid the rubble of World War II's devastation. The OEEC was explicitly charged with the administration of the Marshall Plan for the reconstruction of Europe. Housed in the Château de la Muette in Paris with representatives from its founding 18 Member countries,<sup>11</sup> the OEEC's name expressed well the organization's goals—the promotion of cooperation and commerce among Europe's reconstructed economies, development of a European customs union, and, ultimately, a free trade area.

The OEEC's initial work focused on the effective allocation of the Marshall Plan's grants and credits. Under pressure from the Americans and mindful of the escalating tariffs and protectionism that had

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11. These countries were Austria, Belgium, Denmark, France, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Sweden, Switzerland, Turkey, the United Kingdom, Western Germany, and the Anglo-American Zone of the Free Territory of Trieste. See Organisation for Economic Co-operation and Development, *OECD's Origins: Organisation for Economic Co-operation and Development, 1948–1961*, at <http://www.oecd.org/about/origins/oeec.htm> (last modified Sept. 29, 2000).

accompanied the fall in world exports and rise of fascism, Member countries also agreed to liberalize trade in foodstuffs, manufactured products, and raw materials. By the end of 1950, agreements reached at the OEEC had resulted in freeing 60% of private intra-European trade, rising to 84% in 1955 and 89% in 1959.<sup>12</sup> After the unexpected end of Marshall Plan aid in 1952, the OEEC remained active by directing its energies to European economic development and helping lay the groundwork for the creation of the European Economic Community. It later created the framework for negotiations to establish the European Free Trade Area, creating closer commercial ties between the Common Market members and the other European OEEC members on a multilateral basis.

It is sometimes said that international organizations are designed to prevent the last war and, like the Bretton Woods institutions, the OEEC was created to serve both political and economic ends.<sup>13</sup> Indeed, in the face of the chilly East-West relations of the Cold War, the OEEC served an *explicitly* political role, standing out as the premier international institution committed to the advocacy and development of free market policies. With the establishment of the European Economic Communities in 1957, the original impetus for creation of the OEEC no longer existed. Europe now had a permanent institution dedicated to forging closer economic ties. Member countries had found value in the common forum provided by the OEEC, however, and the Cold War's ideological battle over centrally controlled versus market economies had grown considerably colder and more hostile. Thus the OEEC Member countries decided to create a new organization in its place—the Organization for Economic Cooperation and Development (OECD).

In keeping with its predecessor's mandate, the OECD is first and foremost an economic organization dedicated to the principles of free markets. Its founding treaty requires the organization to promote policies designed:

- (a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
- (b) to contribute to sound economic expansion in Member as well as non-Member countries in the process of economic development; and

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12. *Id.*

13. Krause & Nye, *supra* note 4, at 324.

- (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.<sup>14</sup>

The OECD's original membership of 21 countries (the founding Western European members, the United States, Canada, and the key NATO allies Turkey and Iceland) has expanded to 30 today.<sup>15</sup> The only legal requirement for membership, apart from unanimous approval of existing members, is that an applicant must have a market-based economy.

### B. *OECD Activities*

What does the OECD do? In comparison with other IGOs, it remains a curious creature. Far from being a Cold War relic, the OECD has developed into an amalgam of a rich man's club, a management consulting firm for governments, and a legislative body.

#### 1. Rich Man's Club

The OECD is, first and foremost, an exclusive club whose members produce two-thirds of the world's goods and services.<sup>16</sup> The OECD provides a closed setting for wealthy industrialized governments to share experiences, identify issues of common concern, and coordinate domestic and international policies. In simple terms, the OECD's various standing intergovernmental committees serve as useful talking shops for countries to share experiences and learn from one another's successes and challenges.<sup>17</sup> While it is not voiced openly, it is important to under-

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14. See Convention on the Organisation for Economic Co-operation and Development, Dec. 14, 1960, 12 U.S.T. 1728, 888 U.N.T.S. 179 [hereinafter OECD Convention].

15. The Member countries and dates of accessions are: Australia (1971), Austria (1961), Belgium (1961), Canada (1961), Czech Republic (1995), Denmark (1961), Finland (1969), France (1961), Germany (1961), Greece (1961), Hungary (1996), Iceland (1961), Ireland (1961), Italy (1961), Japan (1964), Korea (1996), Luxembourg (1961), Mexico (1994), The Netherlands (1961), New Zealand (1973), Norway (1961), Poland (1996), Portugal (1961), Spain (1961), Sweden (1961), Switzerland (1961), Slovak Republic (2000), Turkey (1961), United Kingdom (1961), United States (1961). Organisation for Economic Co-operation and Development, *OECD Online: Membership*, at <http://www.oecd.org/about/general/member-countries.htm> (last modified Sept. 29, 2000).

16. See Organisation for Economic Co-operation and Development, *What Is OECD?*, at <http://www.oecd.org/about/general/index.htm> (last modified Sept. 29, 2000) ("The OECD is a club of like-minded countries. It is rich, in that OECD countries produce two thirds of the world's goods and services, but it is not an exclusive club.")

17. Krause & Nye, *supra* note 4, at 337 ("With the growth of economic interdependence, more bureaucracies that were once considered domestic become involved in international affairs. Many bureaucracies and agencies of governments have similar interests. *In some cases, the similarity of interests is greater across national lines than it is with competing domestic agencies and interests.*") (emphasis added).

stand that many OECD country delegates think of the closed-door meetings of the OECD as a welcome alternative forum to what is often viewed as the developing country dominated and politicized United Nations system. The OECD occupies a unique position in the constellation of IGOs, with membership broader than the EU, Nordic Council, or NAFTA, yet much more restrictive than the U.N. or WTO, and topic coverage as broad as any IGO. As a result, the OECD provides a restricted forum on virtually unrestricted topics.<sup>18</sup>

## 2. Management Consulting

The OECD also acts as a high-powered research institution. Its more than 1,800 employees (many of whom are economists) collect data, monitor trends, forecast economic developments, and develop policy options for consideration by Member countries. Its "Economic Outlook" series, for example, forecasts macroeconomic trends over the next two years (e.g., GDPs, employment, account balances, and interest rates), each of which is followed closely by the global financial media. The OECD's ability to gather and synthesize data on members' policy initiatives and results provides a wealth of insight concerning which types of policies work best in particular settings. Unlike sector-specific IGOs such as the United Nations Environmental Program (UNEP), the Food and Agriculture Organization (FAO), the International Maritime Organization (IMO) and others, the OECD's research occurs in virtually all fields of interest to governments, including trade, environment, agriculture, technology, taxation, education, foreign assistance, and employment. The result is over 500 books published annually (in addition to the many reports that are not published).<sup>19</sup> In most cases, the only common feature uniting OECD activities in these disparate fields is their focus on economic impacts. In recent years, research on the impacts of trade (i.e., trade and environmental protection, trade and labor standards) has been carried out on a horizontal basis among directorates, including the Trade Directorate, of course, but also the Directorate for Financial

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18. Perhaps one reason the OECD's mandate is so broad is its lack of direct political power. *See infra* text accompanying notes 19–20. As Krause and Nye have observed:

It is sometimes said that intergovernmental organizations operate according to "the law of inverse salience": the greater the political prominence of an issue, the less the operational autonomy of the organization. This law is sometimes used as a reason for limiting the scope of an organization's domain to a narrow range of issues that are more likely to be susceptible to technical than to broad political treatment.

Krause & Nye, *supra* note 4, at 335.

19. Organisation for Economic Co-operation and Development, *OECD and the Public*, at <http://www.oecd.org/about/public/index.htm> (last modified Sept. 29, 2000).

and Fiscal Affairs and the Directorate for Education, Employment, Labor and Social Affairs.

Importantly, the OECD's research is purposely conducted on behalf of Member country government officials, who direct from the outset the scope of the work with their own domestic policy and legal development concerns in mind. Their research agendas are often strategic, with domestic agency officials attempting to use the OECD as a fulcrum to leverage policies in their capitals.<sup>20</sup> Anne-Marie Slaughter's quotation in the Introduction to this Article refers to just this type of transgovernmental coalition building.<sup>21</sup>

No OECD document may be released publicly without approval by all the Member countries, a process known as "derestriction." Internal documents are not publicly available and can therefore be quite explicit with pointed recommendations and detailed case studies. As a result, internal drafts may differ from public OECD documents. Derestriction can sometimes result in lengthy internal negotiations prior to publication (and some contentious reports are never published).<sup>22</sup> The final product, though, represents as authoritative a source as one can find in the international arena. Importantly, and discussed in the context of the *Labour Standards Study* in Part II.B., the OECD's published research is widely regarded as the result of objective analysis and often serves as the basis for policy debates among opposing groups.

In the field of agriculture, for example, the OECD has become an authoritative source of independent data. Its reports on members' agricultural policies, their implementation, and reform have strongly influenced the debates over increasing cross-border liberalization of ag-

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20. When I worked in the Environment Directorate, Japan financed a work program on extended producer responsibility initiatives in the OECD area. It was commonly understood among the secretariat staff that the Japanese Environment Agency was supporting this research both to learn from other countries' experiences *and* in order to provide political cover for the agency's implementation of this policy. For an explanation of extended producer responsibility, see James Salzman, *Sustainable Consumption and the Law*, 27 ENV'T L. L. 1243 (1997).

21. See Robert Keohane & Joseph Nye, *Transgovernmental Relations and International Organizations*, 27 WORLD POL. 39, 44 (1974) (arguing that transgovernmental coalition building "takes place when sub-units build coalitions with like-minded agencies from other governments against elements of their own administrative structure"); see also discussion *supra* note 9.

22. For example, before publishing my OECD book on environmental labeling, JAMES SALZMAN, *ENVIRONMENTAL LABELING IN OECD COUNTRIES* (1991), the Environment Committee met and raised concerns that needed to be addressed before granting their approval. In particular, I had to negotiate the contents with two countries over several weeks before they agreed to approve derestriction.

ricultural trade (a key issue in the WTO's millennium round).<sup>23</sup> The Environment Directorate, as well, periodically publishes reviews of Member countries' environmental performance. These country assessments are often critical and can shape the course of national policy debates. As any lawyer knows, in an argument most of the battle is over the facts. The OECD's authoritative status often tempers this conflict, allowing parties to focus more directly on the merits of their respective positions.<sup>24</sup>

### 3. Legislation

Bringing together the wealthy industrialized nations in a private setting and providing high-powered research has led in a number of instances to negotiation and adoption of international legal instruments. Article 5 of the OECD's convention provides for Member countries, through the Council of Ministers, to take three types of legal action: Recommendations, Decisions, and agreements with other governmental bodies.

*Recommendations* are non-binding agreements that generally represent policy advice with a strong base of support. As a recent example, in response to the increasing use of information technology to create new avenues for offshore investment for the purposes of tax avoidance and evasion, in 1998 the OECD Council adopted two Recommendations to improve exchange of information between countries, advocating the use of tax identification numbers and a standard magnetic format for automatic exchange of information.<sup>25</sup> Member countries generally use Recommendations either as a means to influence domestic policy development, arguing in their respective capitals that the OECD has endorsed a particular approach, or as a precursor to a Decision.<sup>26</sup>

*Decisions* are legally binding on Member countries. Not surprisingly, adoption of Decisions is less frequent than adoption of Recommendations and the negotiations are followed much more closely

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23. DAVID HENDERSON, *THE MAI AFFAIR: A STORY AND ITS LESSONS* 54–55 (Chatham House, Royal Institute of International Affairs, 1999).

24. To be sure, this should not be taken to suggest that OECD research is always accepted as authoritative by interested parties. But it is noteworthy how infrequently OECD publications are accused of bias or error.

25. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *OECD ANNUAL REPORT, 1998, REPORT OF THE SECRETARY GENERAL*, available at [http://www.oecd.org/publications/97\\_rep/sec\\_gene1.htm](http://www.oecd.org/publications/97_rep/sec_gene1.htm) (last modified Jan. 14, 2000).

26. While it is rare, the OECD can also adopt a non-binding Declaration (effectively a high-profile recommendation). This strategy was apparently floated as a response to Mexico's attempt to block agreement on the Corporate Guidelines (described elsewhere in this Article) to gain concessions in the last days of negotiations.

by Member countries. The OECD's recently completed work on bribery provides a useful example of Recommendations and Decisions at work, as well as the OECD's role as a rich man's club and management consultant. In 1975, the U.N. General Assembly adopted by consensus a resolution on "Measures against corrupt practices of transnational and other corporations, their intermediaries, and others involved." This led to a draft convention on illicit payments four years later.<sup>27</sup> The draft convention was never adopted, however, because developing countries demanded adoption of stronger corporate codes as a precondition for their support. As India stated on behalf of the G77, "the UN Conference on an International Agreement on Illicit Payments [can] be convened *only after* completion of the UN Conference on a Code of Conduct on Transnational Corporation."<sup>28</sup> Developed countries opposed the Code of Conduct and, as a result, neither the code nor the draft convention on illicit payments were adopted.<sup>29</sup>

It took almost twenty years for the OECD to address the issue directly, without developing country opposition. Following extensive discussions amongst Member countries, the OECD adopted Recommendations in 1994, 1996, and 1997 on various aspects of bribery, calling on Member countries to combat international corruption by making bribery of foreign public officials a crime, preventing tax deductions for bribes, prohibiting corruption in contracts funded by development assistance programs, and creating effective company rules on accounting and auditing to reveal practices of bribery. In December 1997, the Member countries and five non-Members agreed to a Decision that made binding the steps agreed to in previous Recommendations.<sup>30</sup> Soon after, the U.N. adopted a declaration against bribery that referred to the OECD and OAS Conventions and passed a code of conduct for public officials.<sup>31</sup> This ability to reach agreement on issues that IGOs with larger membership have been unable to address meaningfully is a unique strength of the OECD although, as we shall see in the case of the MAI, it can prove

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27. See *Conclusions Reached By the Committee on an International Agreement on Illicit Payments*, U.N. Economic and Social Council, 2nd Sess., at 1, U.N. Doc. E/AC.67/L.1 (1979).

28. *Transnational Corporations, India Draft Decision*, U.N. Economic and Social Council, 2nd Sess., Agenda Item 12, at 1, U.N. Doc. E/1980/C.1/L.22 (1980) (emphasis added).

29. For a discussion of the OECD Guidelines and developed country opposition to the Code of Conduct, see *infra* Part II.A.

30. Organisation on Economic Co-operation and Development: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Arg.-Braz.-Bulg.-Chile-Slovk., Dec. 18, 1997, 37 I.L.M. 1, 4 (1998).

31. This history is recounted in Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Ongoing Crusade Against Corruption*, 33 VAND. J. TRANSNAT'L L. (forthcoming Oct. 2000).

a weakness as well. The Convention on Combating Bribery provided for monitoring by the Working Group on Bribery in International Business Transactions to ensure full implementation. Acting in its role of management consultant, the OECD has now published twenty-one country reports examining the Member countries' progress in implementing the Convention.<sup>32</sup> The ability of the OECD Council of Ministers to enter into agreements with Member countries, non-Member countries and international organizations (as provided in Article (5) of the OECD Convention) has generally had little relevance to trade-labor linkages.<sup>33</sup>

Article 6 of the OECD Convention requires consensus for adoption of Recommendations and Decisions, though members may abstain and thereby enter the equivalent of a reservation. The practice of closing meetings to the public and the consensus requirement for Recommendations and Decisions eliminates much of the acrimony and political grandstanding in other IGOs such as the UN's General Assembly. If proponents of a Recommendation or Decision face concerted opposition from even a few countries, a vote will not be taken until significant negotiation has produced a text unobjectionable to all the Member countries. Despite the fact that Decisions are binding, it is exceedingly rare for any OECD Decision to provide sanctions for noncompliance.<sup>34</sup>

Taken together, the OECD's recent efforts to draft international agreements have played a significant role in crafting the emerging architecture of global governance. The agreements negotiated at the OECD to reduce the importance of tax havens, prohibit bribery in international business transactions, revise codes of conduct for corporate governance, and create multilateral rules for foreign direct investment (the aborted MAI) all set in place multilateral rules where weak or non-existent international limits operated before.

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32. Anti-Corruption Unit, Organisation for Economic Co-operation and Development, *Country Reports*, June 27, 2000, <http://www.oecd.org/daf/nocorruption/report.htm> (June 27, 2000).

33. It should be noted, though, that four non-Member countries have acceded to the revised Decision on the Guidelines for Multinational Enterprises, which legally obliges them to set up National Contact Points. See Organisation for Economic Co-operation and Development, *Decision of the Council on the OECD Guidelines for Multinational Enterprises*, [http://www.ois.oecd.org/olis/2000doc.nsf/LinkTo/c\(2000\)96-final](http://www.ois.oecd.org/olis/2000doc.nsf/LinkTo/c(2000)96-final) (June 26–27, 2000). There are currently three non-Members adhering to the Guidelines: Argentina, Brazil, and Chile. The fourth country (the Slovak Republic) has now been accepted as a Member but was not one when it adopted the Guidelines.

34. The Author is not aware of any Decisions with sanction provisions.

### C. OECD Structure

The overall structure and direction of the OECD is determined by the annual meeting of the *Council* at the ministerial level. Decisions and recommendations are voted on by the *OECD Council* at the ambassadorial level, the governing body of Member country representatives that oversees the work of the organization and meets twice monthly, more often if necessary. These are ambassadorial appointments, with one representative from each country as well as the European Union. The OECD's productive work, however, is carried out by specialized *directorates*. The Economics Directorate, for example, publishes the well-known *Economic Outlook* reports, which provide data on economic trends and projecting economic developments. The Statistics Directorate performs a similar function, collecting economic statistics from across the OECD on foreign trade, national accounts, employment, unemployment and other areas. Because all OECD publications must be derestricted by Member countries prior to publication, these data are regarded as officially approved. Other directorates focus on environmental policy, development assistance, public management, science, technology, and industry, and agriculture.<sup>35</sup>

There are three directorates of particular importance to the intersection of trade and labor rights. The Trade Directorate, as its name suggests, analyzes trade policies, explores the basis for common positions, and fleshes out disagreements in advance of future negotiations under the WTO. The Directorate for Financial, Fiscal and Enterprise Affairs (DAFFE) focuses in part on international investment and finance. It took the lead role in supporting negotiations for the Multilateral Agreement on Investment (discussed *infra*). The Directorate for Education, Employment, Labor and Social Affairs (ELSA) is the primary directorate concerned with labor issues and employment. It has developed few recommendations or decisions, placing most of its efforts into research.<sup>36</sup>

Each directorate is governed by a managing *committee*, composed of representatives from Member countries. Thus the Environment Directorate's committee is drawn from officials of environment ministries and agencies. Committees, through a one-country one-vote process, determine the directorate's work program and priorities. Below the committees are *groups* and *ad hoc groups* that oversee the more technical activities and the work program. As an example, the Environment

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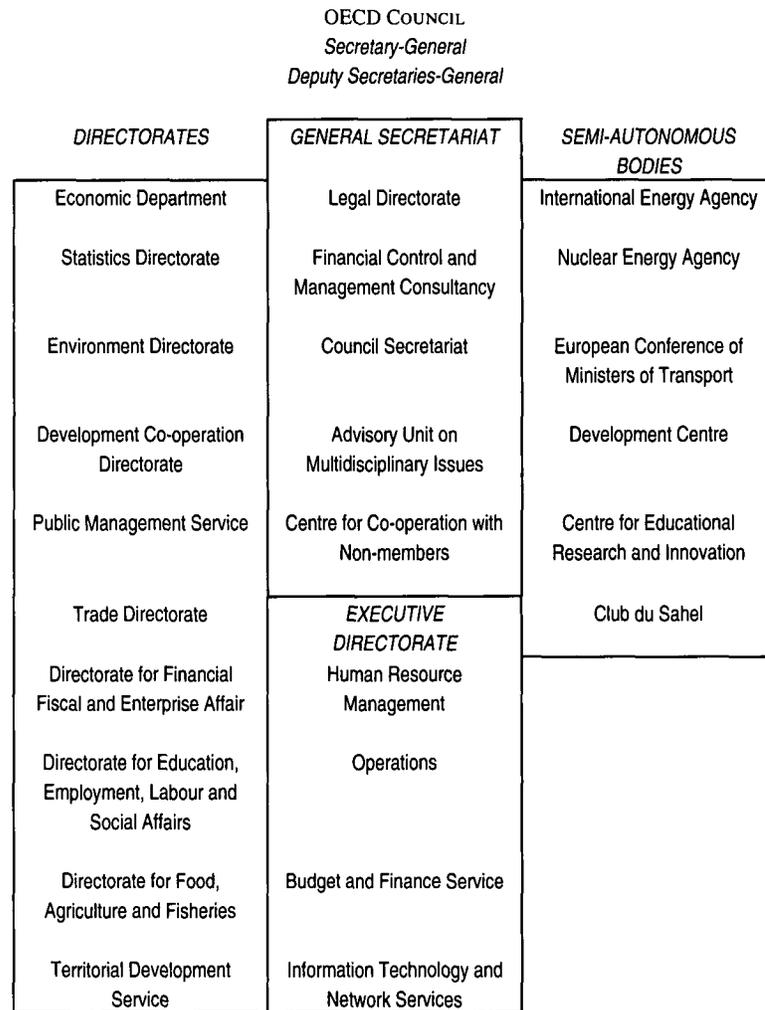
35. See Organizational Chart, *infra* text accompanying note 37.

36. In the 1960s and 1970s, ELSA only issued two recommendations on labor and market policy.

Directorate's main committee, the Environmental Policy Committee, oversees working groups on waste management policy, transport, chemicals, pesticides and biotechnology, and others. In all, there are approximately 200 committees, working groups and expert groups, involving the combined participation of thousands of senior officials from Member country governments. Hence, the amount of information exchange is quite extensive and, importantly, most of these are not directed toward producing decisions or recommendations. Most policy development remains at the informal level.

There has been a growing practice of interdisciplinary work, as well, directly involving the secretariat and country representatives of different directorates. In 1991, the Trade and Environment Directorates, for example, created a common working group to examine aspects of the trade and environment debate. Research on unemployment has brought together specialists from throughout the OECD, including experts on macroeconomics, taxation, technology, labor markets, and social policy. See Organizational Chart on following page.

## ORGANIZATIONAL CHART



The bulk of OECD research, as well as all maintenance and support of the committees and groups, is carried out by the OECD Secretariat. There are about 1,850 staff members in Paris, who function as international civil servants with no formal affiliation to their native countries. Traditionally, middle and higher level national civil servants are supposed to work at the OECD for three to five years before returning to their home countries. This is true for national delegations in practice, but

many in the Secretariat make their careers at the OECD.<sup>37</sup> Roughly 40% of the Secretariat are economists. While there is no formal quota system for hiring, there is a clear awareness of country representation in high-level appointments.<sup>38</sup>

Like other international governmental organizations, the OECD has been under pressure to reduce its expenses. Unlike the U.N., however, the OECD does not lurch from one budget crisis to the next.<sup>39</sup> The budget is the result of annual Member country contributions, calculated according to the size of its economy. Hence, the United States and Japan are the two biggest contributors. Member countries also often choose to support specific work programs and projects of particular interest. The current OECD budget is about \$200 million.

#### D. *BIAC and TUAC*

A classic dilemma facing IGOs, and of particular relevance over the last decade, is how best to interact with nongovernmental organizations (NGOs). If done on a purely ad hoc basis, concerns may arise over special avenues of influence and favoritism for chosen NGOs. As will be addressed in Part III's discussion of the Multilateral Agreement on Investment, the OECD has been both leader and laggard in its interactions with civil society, and its experiences are instructive for other IGOs. In the labor area, the OECD tackled this problem directly through the creation of two nongovernmental partners: the Trade Union Advisory Committee (TUAC) and the Business Industry Advisory Committee (BIAC).

TUAC is the formal representative of labor organizations to the OECD. As explained above, the OEEC's mission was more than simply disbursing funds or re-building Europe on the basis of free markets. Its core mission was equally to preempt support for communism and, for that matter, the re-emergence of fascism. This required explicit consideration of labor interests.<sup>40</sup> It is important to keep in mind that Hungary and the other Central European countries were brought under Soviet control during the same period as the creation of the OEEC. With the annexation of these countries into the Soviet bloc, policy makers became

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37. The enticements of a job at the OECD are considerable. Beyond the five weeks of vacation guaranteed to all French employees and the pleasures of living in Paris, OECD staff salaries are tax free with generous pensions.

38. There is an informal understanding that a United States official will always serve as one of the two Deputy Secretaries-General of the organization.

39. Most of the pressure has come from the United States. In response, the staff has been reduced by 300 people and the budget has been cut 10% for the next three years. Christopher Adams, *Think-Tank Rethinks Its Role*, FIN. TIMES (London), Sept. 24, 1999, at iv.

40. See *supra* text accompanying notes 11-14.

increasingly concerned that workers in Western Europe should have a voice in reconstruction as a potential bulwark against their support of socialist and communist parties. U.S. Ambassador Averall Harriman, speaking at an international trade union conference on the Marshall Plan in 1948, made this point explicitly, stating that “all non-governmental groups and organisations—business, agriculture, science or education—can play a part in this work, but the international labour movement can do the most.”<sup>41</sup>

Originally created in 1948 to provide advice to the OEEC in its implementation of the Marshall Plan, TUAC has continued to provide feedback from the international labor community through regular consultations with OECD committees, the OECD secretariat, and Member country delegates.<sup>42</sup> Based in Paris, TUAC is a free-standing organization with affiliates from over 55 national trade unions in the 29 OECD Member countries, representing approximately 70 million workers. While formally affiliated with the OECD, TUAC is entirely financed by its union affiliates who also determine policy and elect the TUAC officers.<sup>43</sup>

In practice, TUAC exercises influence through regular meetings with the OECD secretariat, drafting policy statements on major areas of interest, and providing feedback to OECD work in progress. Often this takes the form of TUAC presentations to committees and working groups. In keeping with the policy of closed-door meetings, generally the TUAC representative is allowed to participate in the meeting for specific agenda points and then must leave the room. A number of committees, however, have granted TUAC representatives status as active observers. Another crucial avenue of TUAC's influence is through regular communication, usually informally, with Ambassadors and delegation staff. These discussions are often coordinated with contact by TUAC affiliates with either high-ranking officials in capitals, or if need be with Ministers directly. Approximately four hundred trade union representatives participate annually in OECD meetings. TUAC itself has

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41. TRADE UNION ADVISORY COMMITTEE, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, TUAC 1948–1998: PROCEEDINGS OF THE 50TH ANNIVERSARY SYMPOSIUM 52 (1998).

42. TUAC is also responsible for coordinating the trade union input to G7 economic summits.

43. Most TUAC affiliates are members of the International Confederation of Free Trade Unions (ICFTU) and the World Confederation of Labour (WCL). TUAC works in close cooperation with the ICFTU as well as the International Labour Organisation (ILO). TUAC also cooperates with international trade union sectoral organizations concerning sectoral issues such as education, public sector management, steel, and maritime transport. Trade Union Advisory Committee, *About TUAC*, at <http://www.tuac.org/about/about.htm> (last modified May 30, 2000).

only a small staff, thus most of its committee representatives are outside union officials brought in to address specific issues within their expertise.

TUAC's coordination with its member union organizations ranges from presentations at meetings and Congresses of affiliates as well as the more formal TUAC Plenary Session, which meets twice a year and ultimately determines TUAC's operations. All TUAC affiliates and the representatives of international trade union organizations may participate. As with the committees that direct the OECD directorates' work plans, the Plenary Session approves major TUAC policy statements, establishes the work program and priorities, determines the budget and appoints TUAC Officers. The Plenary also appoints an Administrative Committee to supervise more closely TUAC's activities.<sup>44</sup> TUAC has established internal working groups to provide counsel on economic policy, global trade and investment, and education, training and labor market policy.

The Business and Industry Advisory Committee to the OECD (BIAC) was created at the time of the OECD's birth in 1962.<sup>45</sup> An independent organization, BIAC is regarded by the OECD as its official link with employers, business and industry interests. In terms of interactions with the OECD, BIAC shares many of the same features as TUAC. It holds regular consultations with the OECD secretariat, committees and groups in order to provide an institutional counterbalance to the efforts of TUAC. Its operations are overseen by its constituent members, generally national chambers of commerce and employers' organizations.

BIAC and TUAC interact formally in an initiative known as the Labour/Management Program. Partly financed by the OECD, the Program provides a setting for meetings between trade union and management

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44. The current Administrative Committee includes the German Confederation of Trade Unions (DGB) (Germany), the Canadian Labor Congress (CLC) (Canada), the Trade Union Congress (TUC) (United Kingdom), the AFL-CIO (United States), the Force Ouvrière (FO) and the Confédération Française Démocratique du Travail (CFDT) (France), the Confédération Italienne des Syndicats des Travailleurs (CISL) (Italy), the Japanese Trade Union Confederation (RENGO) (Japan), the Federation of Austrian Trade Unions (ÖGB) (Austria), the Finnish Confederation of Salaried Employees (STTK) (Finland), and the Confédération des Syndicats Chrétiens de Belgique (CSC) (Belgium), as well as the President, Vice-Presidents and General Secretary of TUAC. Trade Union Advisory Committee, *How TUAC Works*, at <http://www.tuac.org/how/how.htm> (last modified May 30, 2000).

45. One member of the OECD staff interviewed for this study suggested that the formal roles of TUAC and BIAC might have been an attempt to mimic the tripartite structure of the ILO (government, employers, employees), founded over 30 years earlier. The creation of BIAC fourteen years after that of TUAC, however, suggests that the architects of the OEEC were primarily concerned with the political importance of trade unions' potential support for communist parties and that the employers' need for a voice did not become apparent until over a decade later.

experts on issues that are under examination at the OECD. In 1997, for example, the Program held meetings on tax policy and tax competition, equity and efficiency issues in the labor market, and the role of subsidies in environmental policy.<sup>46</sup>

## II. THE OECD AND PROMOTION OF LABOR RIGHTS

While the OECD is not generally considered a significant IGO in the context of labor rights (if even considered at all), in a small number of cases it has exercised significant influence. Part II presents three examples in which the OECD has, in the context of its work on globalization, directly and indirectly promoted the development of core labor rights. Examination of these cases—the development of guidelines for multinational enterprises, publication of research on the impacts of trade on labor standards, and the accession of South Korea—provides insight into both the potential and limits of the OECD's influence in promoting social issues.

### A. *OECD Guidelines for Multinational Enterprises*

Following revelations in the early 1970s of wide-scale unethical and illegal activities by multinational companies, the U.N., ILO, OECD and national governments focused on means to influence their behavior.<sup>47</sup> As previous examples made clear,<sup>48</sup> much of the early activity centered on the UN's attempt to draft a Code of Conduct on Transnational Corporations. The UN's General Assembly adopted a consensus resolution on measures against corrupt transnational practices, but failed to follow up with a stronger legal instrument. One year later, in 1976, the OECD Council of Ministers adopted a recommendation entitled the Declaration on International Investment and Multinational Enterprises.

As its name suggests, the overriding purpose of the Declaration was to promote transnational investment. To this end, the Declaration called for Member countries to respect national treatment (according comparable treatment to foreign-controlled enterprises as accorded to domestic enterprises), minimize conflicting requirements on multinational enterprises (MNEs) by different governments, and make transparent

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46. TUAC has annual consultations with the Ministerial Council and an annual meeting with Ambassadors called the Liaison Committee.

47. The best known examples during this period were the involvement of ITT and other U.S. companies in the 1973 Chilean coup that overthrew President Allende and the series of bribes Lockheed paid to Japanese politicians for military contracts.

48. See discussion *supra* Part I.B.3.

incentives and disincentives to investment.<sup>49</sup> In its introduction and seven chapters, the Guidelines cover a wide breadth of issues governing investments. The separate chapters range from such topics as information disclosure, competition and financing to taxation, science and technology but the requirements are generally vague and hortatory. The chapter on competition, for example, encourages MNEs “to conform to countries’ rules and policies on competition by, for example, refraining from forming cartels or restrictive agreements and from abusing dominant market positions through anti-competitive acquisitions, predatory behaviour and other practices.”<sup>50</sup>

One of its chapters set forth voluntary rules of conduct for MNEs.<sup>51</sup> These guidelines were necessary to promote investment, it was argued, in order “to encourage the positive contributions which multinational enterprises can make to economic and social progress and to minimise and resolve the difficulties to which their various operations may give rise.”<sup>52</sup> The Guidelines, it was hoped, would ensure that the operations of MNEs were compatible with the expectations of the host country by establishing a baseline of labor rights. They were supported by both TUAC and BIAC—both sides of the bargaining table.

The chapter on employment and industrial relations was regarded with great hope when it was included in the final Declaration. In setting forth labor rights of union representation, collective bargaining, meaningful engagement with management, and non-discrimination, the Guidelines called on MNEs to:

- respect the right of their employees to be represented by trade unions and other bona fide organisations and engage in constructive negotiations with them on employment conditions;
- provide assistance and information to employee representatives;
- provide information for a true and fair view of the performance of the enterprise;

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49. It is interesting to note that the term commonly used by U.N. agencies to describe international business enterprises, “transnational corporations” (TNCs), is not used by the OECD. When I used the acronym in an earlier draft, I was reminded by a member of the OECD Secretariat, in what struck me as gentle snobbery, that “we don’t use that phrase here. We say MNE.”

50. Organisation for Economic Co-operation and Development, *The OECD Guidelines for Multinational Enterprises—Text*, at <http://www.oecd.org/daf/investment/guidelines/mnetext.htm> (June 27, 2000) [hereinafter *Guidelines*].

51. Paragraph 6 of the Introduction states that “observance of the Guidelines is voluntary and not legally enforceable.” *See id.*

52. *See id.* at Preface.

- observe standards of employment and industrial relations not less favorable than those observed by comparable employers in the host country;
- utilize, train and prepare for upgrading their labor force;
- provide reasonable prior notice of changes in operations, in particular on intended closures and collective layoffs;
- refrain from discriminatory practices in their employment policies;
- not exercise unfair influence over bona fide negotiations with employee's representatives;
- enable authorized representatives of their employees to conduct negotiations on collective bargaining or labor-management relations with management representatives authorised to take decisions on the matters at hand.<sup>53</sup>

Implementation of the Guidelines commences at the National Contact Points within national governments. National Contact Points serve as the initial stage of consideration for issues and conflicts arising under the Guidelines. Any party, including BIAC, TUAC, and Member countries, who believes the Guidelines have been violated may request consultations with the Contact Points. If the discussions at this level do not resolve the issue between the parties, it can be passed to the OECD's Committee on International Investment and Multinational Enterprises (CIME, pronounced "seemay"). CIME (located within the Directorate for Financial, Fiscal and Enterprise Affairs) is ultimately responsible for adjudication and development of the Guidelines. CIME will respond to disputes passed up by the National Contact Points by clarifying or interpreting specific language. This process of interpretation involves discussion within CIME as well as consultations with BIAC and TUAC. All CIME decisions require consensus among the Member countries.

Dispute resolution under the Guidelines should not be thought of as a traditional judicial model, for CIME's decisions have no retrospective

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53. While seemingly broad in scope, the Guidelines have been criticized by a number of scholars as too narrowly focused.

The OECD Guidelines assume a mature collective bargaining relationship reflecting institutional interests of large employer federations and trade union groupings that serve on OECD advisory committees. They make no mention of discrimination or violence against workers who try to organize, child labor, forced labor, minimum wages, occupational health and safety, migrant labor, job security, social insurance, the right to strike, or other labor standards.

Lance Compa, *The Multilateral Agreement on Investment and International Labor Rights: A Failed Connection* 31 CORNELL INT'L L.J. 683, 688 (1998).

applicability. Indeed, since the Guidelines were adopted as recommendations, they cannot be treated as binding standards. CIME's judgments do not "enforce the Guidelines" against either of the parties. Perhaps surprisingly, given the formality of the process, CIME does not even make a judgment on the behavior of the companies in question. Instead, it uses the case to clarify the *meaning* of a provision in the Guidelines and how it should be applied in *future* cases. In a legislative context, the closest analogy to this practice would be if Congress continued creating legislative history *after* its passage of a statute. The logic behind this system is similar to that of the common law's clarification of doctrine in specific applications. Unlike the common law analogue, however, CIME's interpretations are never binding once established.

Following the Guidelines' adoption in 1976, TUAC actively sought interpretation of the Employment and Industrial Relations Guidelines and brought a slew of cases resulting in over forty decisions by the end of the 1980s. Their clear goal was to influence both MNE behavior and national laws. Indeed, TUAC has consistently contended that Guidelines are supplementary to national law and "may be contravened even in cases where the multinational enterprise has acted in conformity with national law and practice."<sup>54</sup> The *Firestone* and *Badger* cases provide representative examples of the types of cases brought. The 1980s *Firestone* case concerned the closing of a profitable subsidiary in Switzerland. Brought with the assistance of TUAC, the Swiss Trade Union Centre argued that the local management of Firestone had misled the trade unions and workers committee, stating that the plant would not be closed despite the fact, it later emerged, that local management had been negotiating the closure for over a year. This would seem to violate the Guideline's requirement, excerpted above, that employers "provide reasonable prior notice of changes in operations, in particular on intended closures and collective layoffs." In its review of the case, CIME determined that the Guidelines require headquarters to provide local management with accurate information so that local employees can be informed or top management must inform employees directly. No action was taken (or could be taken) against Firestone.

The *Badger* case addressed whether a corporate headquarters is financially responsible for the debts of its subsidiaries. *Badger* was a Belgian subsidiary of an American company. When *Badger* closed its doors in the 1980s, it dismissed 250 employees and filed for bankruptcy. Belgian law entitled employees to compensation in this instance. The

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54. Fred Einbinder, Book Review, 79 AM. J. INT'L L. 231, 232 (1985) (reviewing DUNCAN C. CAMPBELL & RICHARD L. ROWAN, *MULTINATIONAL ENTERPRISES AND THE OECD INDUSTRIAL RELATIONS GUIDELINES* (1983)).

Belgian subsidiary of Badger, however, did not have sufficient compensatory funds and the American parent refused to pay, arguing limited responsibility. The question at issue was what conditions must exist for a mother company to pay the debts of its bankrupt subsidiary. The Belgian appellant supported its argument with Paragraphs 7 and 8 of the Introduction to the OECD Guidelines.<sup>55</sup> CIME's review concluded that although the Guidelines do not imply an unqualified principle of parent-subsidiary responsibility, there is a principle of qualified responsibility by the parent that exceeds the scope of national law.

While the results of these cases and others led to CIME decisions clearly promoting labor rights,<sup>56</sup> these decisions largely fell on deaf ears at the national level. Given that the Guidelines provided no binding retrospective or prospective application, and carried no sanctions in the case of violations, the lack of domestic response is unsurprising. Realizing the decisions were having little influence on government or MNE behavior, TUAC became less involved and the 1990s saw only four labor cases brought. In a recent example, France requested an advisory opinion over the Hoover Corporation moving its plant to Scotland, claiming that Scottish authorities had offered financial inducements that violated the Guidelines. France also filed a complaint with Belgium against Renault's decision and conduct in shutting down an auto plant in Belgium.

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55. Paragraph 7 stipulates that entities of MNEs located in other countries are subject to the laws of those countries. To this end, the Belgian government argued that the Belgian affiliate is subject to the law of Belgium, which would require Badger Belgium to pay compensation. Paragraph 8 of the Introduction states that the various entities should have the understanding that they must provide the necessary assistance to one another to ensure observance of the Guidelines. Thus, the Belgian government argued that: 1) local subsidiaries must pay; and 2) parent and local entities must cooperate and assist each other in complying with the guidelines in accordance with the actual distribution of responsibilities. See Roger Blanpain, *Transnational Regulation of the Labor Relations of Multinational Enterprises*: 58 CHI-KENT L. REV. 909, 917-18 (1982).

56. Another well known case, the *Hertz* case, addressed whether Guideline 8 forbids the transfer of workers from a foreign branch with the intent to unfairly influence ongoing local negotiations. In the midst of a labor dispute, Hertz Rental Car transferred workers from branches in other countries to replace Danish workers on strike. Hertz workers argued that this undermined a lawful strike in Denmark to avoid bona fide negotiations of a collective agreement with the representative trade union. CIME concluded that while Paragraph 8 did not specifically preclude Hertz's behavior, its actions did not conform to the "spirit" or intent of the Employment and Industrial Relations Chapter. As a result, the Guidelines were amended in 1979 to prohibit the transfer of employees in order to unfairly influence labor negotiations or to hinder the exercise of a right to organize. For this and other case summaries, see Christopher R. Coxson, *The 1998 ILO Declaration on Fundamental Principles and Rights at Work: Promoting Labor Law Reforms Through the ILO as an Alternative to Imposing Coercive Trade Sanctions*, 17 DICK. J. INT'L L. 469 (1999). For the *Hertz* and *Badger* decisions, see INTERNATIONAL ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS, Case Law Supp. vol. 6, at OECD-13, OECD-21 to -22. (Prof. Dr. R. Blanpain, ed. 1985)

Since CIME decisions require consensus and, in any case, are not binding one might well conclude that they have as little influence on corporate behavior as they apparently have had on domestic governments. That certainly is the reason TUAC stopped bringing cases. Criticizing the irrelevance of CIME's decisions, trade union leaders have referred to the Guidelines as a "paper tiger" and a "fig leaf."<sup>57</sup> Indeed, a number of scholars have suggested that the Guidelines' weakness was intentional from the outset—an effective and intentional strategy to *pre-empt* the stricter and more comprehensive United Nations Code of Conduct on Transnational Corporations under negotiation at the same time.<sup>58</sup> As Lena Ayoub has written, because the Guidelines

only effects OECD countries, most of which already have strong trade union movements and relatively consistent enforcement of labor laws, it has done little in the way of solving the human labor rights violations conducted by MNCs. Furthermore, this code is merely reflective of 'boutique rights' and fails to address the human labor rights violations frequently associated with MNCs based overseas.<sup>59</sup>

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57. See Blanpain, *supra* note 55, at 916. Blanpain is skeptical about the ultimate practical effect of the Guidelines:

[T]he Guidelines do not exist at the grassroot level. They are still widely unknown. . . . [T]he actual support by enterprises, such as indications in their annual reports that they support the Guidelines, is meager.

...

What has happened in terms of the further protection of employee interests as a result of the Guidelines and the cases mentioned? Factually, the answer can only be "very little." . . . Emphasis continues to be placed on the practice of industrial relations at the national and local levels and, almost without exception, the disputes that have arisen under the Guidelines have been settled under existing national laws and practices. . . .

*Id.* at 920, 928.

58. The Code of Conduct, for example, addressed human rights and environmental protection, while the Guidelines (until revisions in 1991 and 2000) were silent on these issues. See *Measures Against Corrupt Practices of Transnational and Other Corporations, Their Intermediaries, and Others Involved*, G.A. Res. 3514, U.N. GAOR, 30th Sess., Supp. No. 34, at 69, U.N. Doc. A/10034 (1975); Interview with Daniel Bradlaw, Professor, Washington College of Law, in Washington, D.C. (May 24, 2000). See also Lena Ayoub, *Nike Just Does It—And Why the United States Shouldn't: The United States' International Obligation to Hold MNCs Accountable for Their Labor Rights Violations Abroad*, 11 DEPAUL BUS. L.J. 395, 402 (1999).

59. Ayoub, *supra* note 58, at 421. TUAC has always contended that the Guidelines apply to MNE activities outside of the OECD. They have been unable, however, to convince National Contact Points of CIME to hear a complaint involving a non-Member country. The most recent version of the Guidelines, discussed *infra*, has changed this and applies wherever MNEs from adhering countries operate.

Yet the OECD speaks approvingly of the Guidelines' impact, as do some labor relations experts. Richard Rowan, a professor at the Wharton Business School, contends that the Guidelines provide meaningful mechanisms to influence OECD Member countries and their corporations through surveillance and peer pressure. The Guidelines, he claims,

have been used by the international union movement to support broader union goals. Publicity pertaining to the cases has led to union pressure for the establishment of binding guidelines and legislation. This has been evident most recently in the pressure placed by the European Trade Union Confederation on the European Commission for the passage of the *Vredeling* proposal.<sup>60</sup>

In a later book, Rowan argued that the Guidelines could serve the role of "enforced international regulation of multinationals" through adverse publicity. And, in fact, there are several examples of this, including the most recent case brought.<sup>61</sup>

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60. Blanpain, *supra* note 55, at 928. The *Vredeling* proposal requires employers to provide information to and consult with local employees at least 40 days prior to decisions that are liable to have a substantial effect on the interests of employees, including the rationale for the decision as well as the legal, economic and social consequences to employees.

61. DUNCAN C. CAMPBELL & RICHARD L. ROWAN, *MULTINATIONAL ENTERPRISES AND THE OECD INDUSTRIAL RELATIONS GUIDELINES 7* (Multinational Industrial Relations Series, No. 11, 1983). Lance Compa argues that:

some unions have been able to use the OECD Guidelines to advance their agenda, though more by public relations or inter-union solidarity measures than through pressure brought from the OECD. The United Mine Workers turned to the OECD following a 1988 labor dispute over layoff and recall protections at Enoxy Coal Co., a West Virginia mine owned by ENI, the Italian state-run energy company. A complex "exchange of views" was held among the union, the employers (both the U.S. subsidiary and ENI), and government "contact points" who obtained the views of their own ministries or departments. Pressure on the Italian government by unions helped resolve the dispute to the UMWA's satisfaction.

In the 1980s, a U.S. union facing anti-labor conduct by the local management of a U.S. subsidiary of the Swedish Electrolux corporation used the OECD contact points system. Swedish unions pressured their government to persuade Swedish parent company managers to convince U.S. executives to halt their objectionable conduct. In 1990, the United Food and Commercial Workers made a similar move to the OECD in a dispute with the Belgium-based Carrefour supermarket chain. International pressure that included solidarity moves by Belgian unions brought about a settlement in April 1991, by which the company recognized the union and entered into bargaining.

Compa, *supra* note 53, at 691

The most recent case involved an intervention by TUAC in a dispute between Rio Tinto Australia and an Australian union. While CIME had ruled that Rio Tinto Australia had not breached the Guidelines, TUAC requested a clarification, charging that Australia's National Contact Point had operated in a biased manner. TUAC's request for clarification was success-

The *Guidelines* have been amended four times: in 1979, in 1984, in 1991, and in 2000. In 1991, a new chapter was added on the environment. The most recent revisions, approved on June 27, 2000, were the result of lengthy negotiations with Member countries and consultations with a wide range of NGOs. The new *Guidelines* explicitly refer to the ILO Declaration on Fundamental Principles and Rights at Work in the Preamble. In Chapter IV, the most significant additions focus on human rights. The *Guidelines* state that “enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices . . . contribute to the effective abolition of child” labor and “[c]ontribute to the elimination of all forms of forced or compulsory labour.”<sup>62</sup> Enterprises are also called upon, to the greatest extent practicable, to employ local personnel and provide training to increase skill levels. TUAC lobbying efforts to change the requirement of CIME agreement to a supermajority or a “consensus minus one” (i.e., except the country where the practice was challenged) were unsuccessful. Labor advocates were, however, successful in expanding the jurisdiction of the *Guidelines*. The *Guidelines* now apply to the global operations of MNEs based in adhering countries. Thus, for example, a Venezuelan-based subsidiary of an American MNE would be covered by the *Guidelines*.<sup>63</sup>

The substance of the *Guidelines* was not the only change of importance in the recent review. As explained in the concluding section, as a result of the MAI experience,<sup>64</sup> the revision process was much more inclusive than ever before. For the first time ever, CIME actively sought input from both *outside* the OECD (public comments and the ILO) and

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ful, allowing the union to re-submit the case. In part because of the negative publicity surrounding the case, Rio Tinto subsequently cut a deal with the union. This dispute took place during the review of the *Guidelines*, and TUAC’s Senior Policy Advisor believes that “[t]his . . . raised the ante as regards the Working Party debate around new implementation procedures.” Email from Roy Jones, TUAC Senior Policy Advisor, to James Salzman, Associate Professor of Law, Washington College of Law (Aug. 3, 2000) (on file with author).

62. *Guidelines*, *supra* note 50, at Chapter IV.

63. While Venezuela would not have a National Contact Point in its government, the Procedural Guidance annex to the Council Decision on the *Guidelines* provides advice and guidance for the U.S. National Contact Point to follow in case of challenges in non adhering countries. Email from Roy Jones, TUAC Senior Policy Advisor, to James Salzman, Associate Professor of Law, Washington College of Law (Aug. 3, 2000) (on file with author). The actual coverage of the *Guidelines* could be larger yet, since the General Policies chapter mentions sub-contractors and suppliers of MNEs. See *Guidelines*, *supra* note 50, at Chapter II(10).

64. See Organisation for Economic Co-operation and Development, *OECD Issues Revised Draft of its Guidelines for Multinationals for Further Public Comment*, at <http://www.oecd.org/media/release/nw00-27a.htm> (Mar. 15, 2000); see also discussion *infra* Part III.A.5.

inside (from the Environment Directorate, ELSA and the OECD Working Party on Bribery and Corruption).

### B. *The Labour Standards Study*

Unlike most other OECD directorates, ELSA does not develop recommendations or decisions and never has. Rather, its focus has been on careful analytic research and policy development, preferring to leave political activity to the much larger tripartite ILO (i.e., representatives from unions, employers' organizations, and government). The most recent important example of this approach was the 1996 report *Trade, Employment, and Labour Standards: A Study of Core Worker's Rights and Labour Standards (the Labour Standards Study)*.<sup>65</sup> In the early 1990s, ELSA began a joint project with the Trade Directorate and the Directorate for Financial and Fiscal Affairs (DAFFE) to examine the relationships between core labor standards and flows of trade and foreign direct investment. In particular, the research considered the impact of core labor standards on economic development and assessed the use of trade-related sanctions to promote core labor standards. The report was written over an intensive two-year period of workshops and drafting sessions.

The OECD's research brought about four significant developments. First, while it is beyond the scope of this paper to review the findings of the report in detail,<sup>66</sup> the basic conclusions played a strong role informing international debate on the issue. In particular, the report addressed head-on the widely held view that failure to respect core labor standards enhances trade and foreign investment performance (i.e., the concern from some developing countries that creating certain labor rights would undermine their comparative advantage). The study found that the economic effects of core labor standards are small, with no evidence that low-standard countries enjoy better export performance than high-standard countries.<sup>67</sup> Thus "concerns expressed by certain developing

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65. ORGANISATION OF ECONOMIC CO-OPERATION AND DEVELOPMENT, TRADE, EMPLOYMENT AND LABOUR STANDARDS: A STUDY OF CORE WORKERS' RIGHTS AND INTERNATIONAL TRADE (1996) [hereinafter *LABOUR STANDARDS STUDY*]. The study first justifies its selection of core labor standards, then reviews 91 countries to assess whether they have observed the standards, examines the impact of core standards on trade flows, trade liberalization, development, employment, investment, and ends by considering mechanisms to promote labor standards.

66. For a detailed summary and critique of the findings, see Steve Charnovitz, *Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labor Standards Debate*, 11 *TEMP. INT'L & COMP. L.J.* 131 (1997).

67. The OECD identified four core rights: (1) Freedom of association and the right of collective bargaining; (2) Prohibition of forced labor; (3) Prohibition of discrimination in employment; and (4) Prohibition of exploitative forms of child labor.

countries that core standards would negatively affect their economic performance or their international competitive position are unfounded.<sup>68</sup> Moreover, there was no evidence that labor rights worsened in countries that liberalized trade or that the promotion of labor rights impeded liberalization. Indeed, the study suggested that respect for core standards and economic development were mutually reinforcing. From TUAC's perspective, the report both confirmed the consensus support of OECD Member countries for core labor rights and laid the groundwork for the ILO Declaration on Fundamental Principles and Rights at Work. It also heightened the OECD's sensitivity to labor rights concerns and made it easier for countries to demand recognition of labor rights as a condition for South Korea's accession to the OECD.<sup>69</sup>

Second, the exercise greatly enhanced communication concerning trade and labor rights both between governments and, perhaps surprisingly, within governments. The exercise of writing a joint report by the Trade Directorate, DAFFE and ELSA forced together officials from each nation's trade and labor ministries into unified country delegations. As a result, officials who most likely did not communicate with one another in their own capitals were forced to forge common national positions. Thus, the publication process required separate ministries within national governments to consider seriously the linkages between labor rights and trade, competitiveness, and foreign direct investment, as well as how best to enforce core labor standards. And these were taken seriously. It is worth noting, for example, that the country comments on the study were nearly three times as long as the study itself.

Third, the exercise brought the issue of relative institutional spheres of influence to the fore. There was a great deal of negotiation among Member countries over the common statement introducing the report, focusing on the respective roles of the WTO and ILO on labor issues. In particular, a number of countries questioned whether labor issues should be considered by the WTO at all since the ILO is the preeminent international labor institution. This argument is very similar to the trade and environment debate and, of course, fails to consider the relative influence of the two institutions.<sup>70</sup> The end result was noncommittal language

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68. LABOUR STANDARDS STUDY, *supra* note 65, at 13.

69. See discussion *infra* Part II.C.

70. In the case of trade and the environment, free traders often argue that the WTO agreements are an inappropriate vehicle to address environmental issues. Instead, they call for consideration of these issues in the U.N. Environment Program or conferences of the parties of multilateral environmental agreements. See generally HUNTER, SALZMAN & ZAEKKE, *supra* note 5, at 1178-79 (discussing the complexity of the trade and environment debate). A similar disagreement over linkages resurfaced in negotiations over the Multilateral Agreement on Investment.

stating that, "while some countries continue to call for a discussion of the issue [of core labor standards] in the WTO and others are opposed, this remains an issue for international consideration. The debate on this issue and on the associated conceptual and practical difficulties will continue."<sup>71</sup>

Fourth, and perhaps surprisingly, the *Labour Standards Study* provided an important impetus for developments within the ILO. While the study was written by the ELSA secretariat, there was a great deal of consultation with ILO staff, particularly in determination of core labor rights.<sup>72</sup> In consulting with the ILO in early drafts of the *Labour Standards Study*, the ELSA secretariat asked the ILO to prioritize its conventions. Internally, ILO staff were reluctant to do so and unwilling to determine which labor protections and rights were more important than others. Over time, however, by identifying the core labor standards for the OECD secretariat to consider, the ILO clearly paved the way for the later ILO Declaration on Fundamental Principles and Rights at Work in 1998 and Convention 182 on the Elimination of the Worst Forms of Child Labor in 1999.<sup>73</sup>

Would the results have been the same if the *Labour Standards Study* had been written by the ILO or the United Nations Conference on Trade and Development (UNCTAD) instead of the OECD? Given the political composition of the institutions, the answer is almost certainly no. Reaching agreement on the research findings among the 29 OECD Member countries was hard enough. Had the exercise taken place at the ILO, reaching agreement among the labor, employer and government officials from both developed *and* developing countries would have been harder still. In this regard, the OECD has a comparative advantage in

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71. LABOUR STANDARDS STUDY, *supra* note 65, at 17.

72. While the core rights, listed *supra* note 67, are undoubtedly important, they leave a great deal out, failing to address the right to strike, workplace health and safety, migrant worker protection, minimum wages that provide decent living standards, job security, social insurance, adjustment assistance for workers displaced by trade, and other "vital workers' concerns." Compa, *supra* note 53, at 688. These rights and standards "are affected perhaps even more than 'core' concerns by trade and investment pressures on many governments to deregulate their domestic labor markets." *Id.*

73. International Labour Organization, International Labour Conf., 86th Sess., *Declaration on Standards and Fundamental Principles and Rights at Work*, available at <http://www.ilo.org/public/english/standards/norm/index.htm> (last updated Mar. 1, 2000). Prior to these agreements, the main ILO instrument on the issue of child labor had been Convention 138 on minimum employment age. Because it had failed to distinguish child labor in general from its worst forms, however, Convention 138 had attracted very few ratifying parties.

Members of the ELSA secretariat who had presented the *Labour Standards Study* at the ILO in 1996 (to the Working Party on the Social Dimensions on the Liberalisation of International Trade) clearly believed it had contributed to move the debate away from sanction-based mechanisms toward promotion of core labor standards.

terms of efficiency both because its membership is restricted to generally like-minded economic partners and, perhaps more important, since it need not gain the approval of BIAC or TUAC.

One might argue, though, that ILO research, because of the need for collaboration with the social partners, produces more evenhanded results that fairly reflect the perspectives of governments, labor and management. Indeed, it is precisely for this reason that ELSA has no intention of developing regulations or standards. The structure of the ILO is much more amenable to these political activities. Yet it is equally, if not more likely, that the collaboration would result in vague and ineffectual compromise at the lowest common denominator. UNCTAD could argue, too, that its research reflects more fairly the concerns of developing countries than OECD publications. As Steve Charnovitz has noted, for example, topics of particular importance to developing countries have received scant attention.

Many important issues regarding investment are omitted. The OECD Secretariat does not study the extent to which corporations use domestic labor standards in operating foreign plants. Nor does the Secretariat analyze whether governments should apply core labor standards being enforced domestically to their own corporations operating in other countries. . . . Despite the fact that labor standards may be an important factor in economic development, the OECD Study barely scratches the surface on this issue.<sup>74</sup>

This may well be the case, but must be considered in light of the fact that neither the ILO nor UNCTAD possess the combined research personnel and funding of the OECD. Moreover, given the rules of consensus for derestriction and the OECD's access to government data, the *Labour Standards Study* represents a statement of considerable authority.<sup>75</sup>

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74. Charnovitz, *supra* note 66, at 138–47. While the quote above accurately describes the final text, it fails to acknowledge the often bitter arguments between governments, TUAC, and BIAC over whether to address labor standard abuses in foreign plants (i.e., in subsidiaries of MNEs based in OECD countries). Apparently several governments supported TUAC's demands to examine this issue but faced strong opposition threatening to block the entire study. Email from Roy Jones, TUAC Senior Policy Advisor, to James Salzman, Associate Professor of Law, Washington College of Law (Aug. 1, 2000) (on file with author).

75. It should be noted, however, that the study was not without critics:

The study is silent with respect to: (1) how strong the correlation is between ratification of, and compliance with, ILO conventions; (2) what the labor records reveal of the countries most vociferously opposing a WTO role in reviewing labor standards; and (3) whether there is correlation between non-compliance with

And it is authoritative in a number of ways. It is no news for the ILO to publish a report concluding that the benefits of improved labor rights are large while the costs are small. Indeed most observers *expect* the ILO to produce research that promotes labor rights. That is one of the main reasons for the organization's existence. The same conclusion coming from the OECD, however, is another matter entirely. One can justify core labor standards through either normative or efficiency arguments. The ILO provides an effective international forum to publicize the ethical bases for core labor rights. The OECD, in contrast, rarely ventures into explicit normative pronouncements. This is not surprising, given its expertise in economic analysis.<sup>76</sup> As a result, the OECD carries considerable authority when declaring economic findings. This is, after all, the same organization to whom countries and markets listen attentively when forecasting economic growth. Ironically, the OECD's *Labour Standards Study* proved influential precisely because it was a topic *outside* the OECD's traditional areas of focus, yet the issues were framed in terms of economic analysis—translating rights into economic impacts—as questions particularly *within* the OECD's sphere of unchallenged expertise.<sup>77</sup>

### C. Accession of South Korea

From 1990 through 1995, in response to the fall of the Iron Curtain and the rise of NAFTA, the OECD's membership grew 20% through

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multilateral conventions on labor standards and non-compliance with other multilateral conventions (e.g., environmental standards). . . .

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Taken as a whole, the OECD Study is disappointing. In some instances, the Secretariat exaggerates faint relationships. Its analysis is weak, and many important issues are omitted or inadequately addressed. The most serious problem, however, is that the OECD Study provides little added-value to the ongoing international debate. This is uncharacteristic of the OECD, which traditionally has produced cutting edge analysis of public policy. Perhaps political pressures within the OECD impeded the normal standard of quality typically shown in OECD work.

Charnovitz, *supra* note 66, at 138, 152. Charnovitz's characterization seems overly harsh since, as described *supra*, the *Labour Standards Study* significantly influenced the acceptance of a "core" set of labor rights by governments in the ILO.

76. This is not to suggest that economic analysis is somehow pure and free from normative assumptions (e.g., that efficiency is a desirable and appropriate social goal). Such normative underpinnings, however, remain largely unspoken.

77. As a member of the ELSA secretariat commented, "One remarkable illustration of the influential role of the 1996 study on trade and labour standards is the very large number of people and institutions that advocate the paternity of the conclusions emerging from the study—in sharp contrast with the difficult period before its completion, when the project looked like an orphan."

adding four new countries.<sup>78</sup> Labor rights did not have a bearing on these accession negotiations, and never had for other countries, but they played a central part in the accession of South Korea. During the 1980s and early 1990s, South Korea had been the subject of a series of damning reports on labor practices. The international trade union movement, including TUAC and the International Confederation of Free Trade Unions (ICFTU), had long been concerned over Korean labor rights, pushing the issue vigorously at the ILO. When Korea announced its desire to join the OECD, labor groups seized the opportunity to raise the issue where they could exercise real leverage, using accession to the OECD as a carrot and, conversely, denial of OECD membership as a stick. In conjunction with their national governments, these trade union bodies lobbied the Member countries to press Korea on core labor rights; countries such as the United States, the Nordic countries, and Austria took up the cause actively.

In response to concerns raised over its employment practices, the South Korean government promised to move towards internationally-accepted labor standards in exchange for OECD membership. In October 1996, South Korea's foreign minister sent a letter to the OECD promising his country would change its labor laws to reflect "internationally accepted standards." In approving Korea's accession, the OECD Council welcomed Korea's commitment "to reform existing laws on industrial relations in line with internationally accepted standards, including those concerning basic rights such as freedom of association and collective bargaining."<sup>79</sup>

Interestingly, the legal basis for requiring core labor rights as a precondition for OECD membership is unclear. While the OECD's Internet website states that "the OECD brings together 29 countries sharing the principles of the market economy, pluralist democracy, and respect for human rights,"<sup>80</sup> the OECD Convention creating the organization is silent regarding democracy and human rights. Articles 1 and 2 require only that members promote policies designed to achieve the highest sustainable economic growth and employment, contribute to the expansion of world trade on a multilateral and non-discriminatory basis, ensure economic growth and external and internal stability, reduce

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78. These were Hungary, the Czech Republic, Poland, and Mexico.

79. Organisation for Economic Co-operation and Development, *Pushing Ahead with Reform in Korea—Labour Market and Social Safety-Net Policies, Table of Contents, Introduction, Summary, and Policy Conclusions*, at <http://www.oecd.org/els/pdfs/Labour/docs/Korea.pdf> [hereinafter *Korea*].

80. Organisation for Economic Co-operation and Development, *OECD Online: Membership*, at <http://www.oecd.org/about/general/member-countries.htm> (last modified Sept. 29, 2000).

obstacles to trade in goods and services, keep each other informed with the information necessary for the accomplishment of its tasks, and consult together, carry out studies, and cooperate closely.

At a certain level, though, the lack of a firm legal basis requiring respect for core labor rights is irrelevant. Since a consensus vote by the Council of Ministers is required, the final decision for OECD accession is explicitly political.<sup>81</sup> Thus if a group of countries demands adherence to certain requirements for accession, that becomes a mandatory requirement in practice if not on paper. Thus does custom become crystallized. In the case of Korea, Member countries decided that this accession required meeting certain internationally-agreed labor standards.<sup>82</sup> These standards, it should be noted, were never spelt out in detail. However, they have tended to coalesce informally around Korea ratifying ILO Conventions 87 and 98.<sup>83</sup>

The problem with such a practice is laid bare when a party violates this understanding. Within months upon acceding to OECD membership, the Korean government introduced new laws that *weakened* labor rights, making it easier for employers to fire workers while keeping tight controls on the political rights of labor unions.<sup>84</sup> Not surprisingly, this

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81. Article 16 of the Convention establishing the OECD requires unanimity. OECD Convention, *supra* note 14, at Art. 16.

82. It is interesting to note that a double standard may be at play here. The U.S. Department of Labor's National Administrative Office (established under the North American Agreement on Labor Cooperation, the labor side agreement) has determined that Mexico does not grant workers the right of free association. However, Mexico's accession, championed by the United States, was not linked to provision of labor rights. See U.S. NATIONAL ADMINISTRATIVE OFFICE, U.S. DEPT. OF LABOR, PUBLIC REPORT OF NAO SUBMISSION No. 940003 (1995), available at <http://www.dol.gov/dol/ilab/public/media/reports/nao/pubrep940003.htm> (last modified Jul. 31, 2000); Interview with Jerome Levinson, Professor of Law, Washington College of Law, in Washington D.C. (May 29, 2000) (on file with author).

Part of this double standard is likely due to timing. Mexico was the first in the new wave of OECD Members since the early 1980s. As such, there was no structural procedure in place to assess a candidate's eligibility to join. While there had been informal discussions between Ambassadors and senior OECD officials about Mexico joining, there had been no formal examination or preparatory work in any of the OECD Committees (such as the now standard process of an examination by CIME of the liberalization of capital account issues). Apparently, the U.S. Treasury Secretary's announcement of the Ministerial of Mexico's ability to join had not been cleared with (or agreed to by) other governments. The OECD Secretary General and other governments concerned about the informality of Mexico's admission then set in place Committee vetting procedures for future accessions.

83. Convention 87 is the Freedom of Association and Protection of the Right to Organise Convention, July 9, 1948 reprinted in 1 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1919-1991 435 (Int'l Lab. Org. ed., 1992); Convention 98 is the Right to Organise and Collective Bargaining Convention, July 1, 1949, reprinted in 1 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1919-1991 524 (Int'l Lab. Org. ed., 1992).

84. John Burton & Peter Montagnon, *Labour Law Pledge Backfires on Kim: Seoul Could Face the OECD's Unprecedented Censure*, FIN. TIMES (London), Jan. 21, 1997, at 6.

was viewed by OECD members as a violation of the October understanding and many of the Member countries demanded formal action against the newest Member country.<sup>85</sup> Beyond the perceived need to demonstrate the organization's disapproval of South Korea's actions, there was an even greater worry that this episode would serve as a troubling precedent. There was real concern that the example of South Korea joining a global economic organization and then defying its accession commitments could affect China's application to join the WTO.

As a result, the OECD Council for the first time ever put in place a Special Monitoring Process, directing the Secretariat to monitor labor developments in a Member country. While formally this was not a motion of censure, it effectively operated as such. The Council asked ELSA to "monitor closely the progress made on labour law reforms in light of that commitment [i.e., Korea's commitment that its labor laws would reflect internationally accepted standards]."<sup>86</sup> ELSA's discussions with Korea have focused on the country's commitments to safeguard freedom of association and the right to collective bargaining.<sup>87</sup> ELSA published its review of labor rights in Korea this past June.<sup>88</sup>

The influence of the OECD's monitoring process has been mixed. On the positive side, despite the absence of concrete sanctions, the focused attention of the OECD has clearly been of concern to the Korean government and its labor laws have started to improve.<sup>89</sup> As a TUAC official observed, "[i]t could be legitimately argued that outside of domestic pressure, it has been OECD membership more than anything else, including Korea's membership of the ILO that has led to the legalisation of the teachers union, which paved the way for the legalisation of the KCTU [i.e., the Korean Confederation of Trade Unions]."<sup>90</sup>

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85. Indeed, ELSA was asked by the Council to verify whether Korea's actions had violated its commitments to labor rights at the time of its accession.

86. See *Korea*, *supra* note 79, at 13.

87. ELSA focused on "a number of areas where Korean law and practice in industrial relations was believed to be in conflict with internationally accepted standards." *Korea*, *supra* note 79, at 13. These areas include trade union pluralism, third-party intervention in collective bargaining, the right of public servants and teachers to organize, the right to strike in the public sector, trade union membership "of dismissed or unemployed workers," and "the payment by companies of their trade union officials." *Id.* at 13-14. There were also concerns about "the arrest and imprisonment of trade unionists for activities that would be regarded as pursuit of legitimate trade union goals in member countries." *Id.* at 14.

88. See *Korea*, *supra* note 79, at 5.

89. There is "no doubt" that, since the beginning of the monitoring process, "the legislative reforms have shifted Korean labour laws significantly in the desired direction." *Korea*, *supra* note 79, at 14.

90. Email from Roy Jones, TUAC Senior Policy Advisor; to James Salzman, Associate Professor of Law, Washington College of Law (Aug. 1, 2000) (on file with author).

In light of its progress, Korea launched a major diplomatic offensive in the spring of 2000 to suspend the Monitoring Process, with the support of Japan and other Member countries. Through a mix of unilateral opposition by some governments, supplemented by TUAC's lobbying efforts with affiliates in capitals to swing their governments behind this opposition, the motion before the Council to suspend the Monitoring Process was defeated. In fact, the Council voted to continue ELSA's monitoring activities. Shortly after this vote, in June and July, Korean police allegedly attacked peacefully protesting union workers, arresting the president of the Korean Confederation of Trade Unions, Dan Byung-ho.<sup>91</sup>

Finally, it is interesting to note that Korea has not been required to ratify the two ILO conventions that clearly embody core labor rights (Conventions 87 and 98). While Korea has made substantial progress in a number of areas, the ILO would likely not consider its legislation and practice sufficiently "ripe" or advanced to sign them. Moreover, adherence to these Conventions was never expressly requested by other OECD Member countries (indeed, five Member countries, including the United States, have not signed one or both of these Conventions, either). In sum, then, the Council would likely accept a situation, similar to the current U.S. situation, in which Korea complied with the important requirements of the conventions without explicitly ratifying them.

### III. THE OECD AND GLOBALIZATION

The OECD's most recent involvement with labor rights revolved around negotiations over the Multilateral Agreement on Investment. This Part presents a detailed case study of this episode because, beyond being a fascinating story, the history of the agreement provides important substantive and institutional insights. Substantively, the negotiations represent the most recent attempt to link labor rights with an agreement increasing economic liberalization. Institutionally, as a result of its bruising interactions with governments and civil society, the OECD's perception of itself and the public's perception of the OECD have dramatically changed.

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91. Kim Min-hee, *Police Clash with Unionists as Raid Ends 21-Day Lotte Hotel Walk-out*, KOREA HERALD, June 30, 2000, available at LEXIS, News Library, Korea Herald File.

A. A Case Study of the Multilateral Agreement  
on Investment (MAI)

In the early 1990s, the OECD's Committee on International Investment and Multinational Enterprises (CIME) commenced a research project known as the Wider Investment Instrument Project. The project reflected the concern among Member countries that existing multilateral instruments governing foreign direct investment (FDI) had become inadequate in the face of unprecedented increases in investment. Flows of foreign capital to developing countries, for example, had increased ten-fold from 1982 to 1993 and almost twenty-fold by 1996, with a 40% increase in FDI inflows from 1994 to 1995 alone.<sup>92</sup> Total FDI now exceeds the value of goods in trade by more than five-fold yet, remarkably, no comprehensive agreement governing FDI exists at the international level.<sup>93</sup>

Absent a GATT or other treaty, the international legal framework governing FDI has developed incrementally through a broad network of bilateral investment treaties (BITs), which both establish and clarify the rights of foreign investors. Mirroring the growth of FDI, the number of BITs has dramatically increased as well. From 1989 to 1995, more BITs were negotiated than during the previous three decades.<sup>94</sup> By 1995, over 900 BITs had been signed between more than 150 nations.<sup>95</sup> Through its Wider Investment Instrument Project, the OECD Member countries sought to bring order to this proliferation of FDI and BITs, perhaps through a multilateral agreement on investment (MAI) that would consolidate and harmonize the many BITs. This seemingly straightforward and necessary exercise, however, became engulfed in a political and public relations firestorm just a few years later, due in large part to its treatment of labor rights. Despite the OECD's role in administering the OECD Guidelines, the publication of the *Labour Standards Study*, and the requirements accompanying South Korea's accession, the organization was hardly a major focus of labor activists. How could it come to pass that the low-profile, largely ignored OECD would soon become

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92. Eric Burt, Note, *Developing Countries and the Framework for Negotiations on Foreign Direct Investment in the World Trade Organization*, 12 AM. U. J. INT'L L. & POL'Y 1015, 1019 (1997).

93. Sol Picciotto, *Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement on Investment*, 19 U. PA. J. INT'L ECON. L. 731, 744 (1998); Kenneth J. Vandeveld, *Sustainable Liberalism and the International Investment Regime*, 29 MICH. J. INT'L L. 373, 382 (1998) [hereinafter Vandeveld, *Sustainable Liberalism*]. See also Burt, *supra* note 92, at 1016.

94. Kenneth J. Vandeveld, *Bilateral Investment Treaties*, 90 AM. J. INT'L L. 545 (1996) (book review) [hereinafter Vandeveld, *Bilateral Investment*].

95. *Id.*

subject to condemnation by critics across the globe as the furtive architect of a new world order?

### 1. A Brief History of Investment Treaties

To answer, it is first necessary to place the OECD's efforts within the larger historical context of legal restraints on investment. The initial rise of large-scale FDI was an outgrowth of the large capital surpluses generated by the nineteenth century industrial revolution.<sup>96</sup> For the next century, foreign investors faced two basic risks—repudiation of debts and expropriation of property—and conflicting doctrines were cited as controlling. The Calvo Doctrine, developed by nineteenth-century Argentine Carlos Calvo, maintained that foreign investment was due treatment no more favorable than that given to local investment. In practice, this meant that all investments, foreign and domestic alike, were subject to and subordinate to national economic policies, perhaps including nationalization of industries and clearing of debts. The Calvo Doctrine clashed directly with the policies of major European powers and the United States, who freely and frequently used their armies to enforce collection of private debts. Thus Teddy Roosevelt built on the Monroe Doctrine, announcing that the United States reserved the exclusive right to collect private debts in the Americas, by force if necessary.

While disputes over the appropriate treatment of FDI had arisen following the nationalization of property by the Soviet Union after the Bolshevik revolution of 1917,<sup>97</sup> conflict over investment protections openly flared in 1938 when Mexico nationalized oil wells and farms owned by U.S. companies. In a famous cable (later known as the Hull Formula), Secretary of State Cordell Hull demanded “prompt, adequate and effective” compensation for the expropriated property. In response, Mexico replied that the foreign investors were due no more compensation than that due to local investors; the principle of national treatment demanded that the law should apply evenhandedly.

A League of Nations draft convention on investment had been proposed as early as the 1920s but failed to gain sufficient support for adoption from both capital-exporting and capital-importing countries. Following World War II, FDI protections were one of the key economic issues addressed in the Bretton Woods negotiations. While the GATT focused on trade, the more expansive Havana Charter was drafted to address both trade and investment concerns. The proposed International

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96. See generally Vandeveld, *Sustainable Liberalism*, *supra* note 93, at 375–85.

97. Ian Brownlie states that from 1840 to 1940, some 60 claims commissions were created to resolve disputes concerning harm to foreign interests. Vandeveld, *Sustainable Liberalism*, *supra* note 93, at 379 n.43.

Trade Organization would have had the authority “to facilitate an equitable distribution of skills, arts, technology, materials and equipment” and to “assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another.”<sup>98</sup> The ITO’s investment provisions were general, requiring only that States “give due regard to the desirability of avoiding discrimination as between foreign investments.”<sup>99</sup> Even these mild requirements, however, proved controversial, drawing criticism from developing countries that regarded them as too biased toward protection of multinationals and from developed countries that regarded them as too restrictive. With the failure of the Senate to ratify the Havana Charter, international regulations for FDI never entered into force.

While the U.N. Charter outlawed the use of force to protect foreign property, thus vitiating the Monroe Doctrine’s threat of martial investment protections, there still existed no strong international agreement addressing FDI. Despite (or perhaps because of) the broad scale nationalization of companies by former colonies in the 1950s and 1960s, attempts in the GATT over that period to negotiate comprehensive FDI rules also failed.<sup>100</sup> At the time these were not regarded as critically important losses since FDI was much less significant than trade to the vitality of the international economy.

During this period, the OECD played a significant role in regulating FDI. Since its earliest days, the OECD has promoted liberal economic

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98. 1 U.N. CONF. ON TRADE & DEV., INTERNATIONAL INVESTMENT INSTRUMENTS at 4, U.N. Doc. UNCTAD/DTC/30.Vol.1, U.N. Sales No. E.96.II.A.9 (1996). It also provided a chapter addressing restrictive business practices, with international complaints and investigation procedure, as well as a labor clause. *See id.*; Picciotto, *supra* note 93, at 733.

99. U.N. CONF. ON TRADE & EMP., CHARTER FOR THE INTERNATIONAL TRADE ORGANIZATION, FINAL ACT AND RELATED DOCUMENTS at 9, U.N. Doc. ICITO/1/4, Sales No. 1948.II.D.4 (1948). *See also* Burt, *supra* note 92, at 1029.

100. A 1958 GATT resolution recognized that the activities of multinationals “may hamper the expansion of world trade and economic development in individual countries and thereby frustrate the benefits of tariff reductions and of removal of quantitative restrictions or otherwise interfere with the objectives of the General Agreement.” Restrictive Business Practices: Appointment of Group Experts, Nov. 5, 1958, GATT B.I.S.D. (7th Supp.) at 29 (1959). An Experts Group was created to examine the regulation of multinationals’ practices and determined that a comprehensive agreement was not feasible. *See* Restrictive Business Practices: Arrangements for Consultations, June 2, 1960, GATT B.I.S.D. (9th Supp.) at 170–71 (1961). As a result, the GATT Contracting Parties agreed to allow governments to negotiate over harmful multinational activities. *See* General Agreement on Tariffs & Trade, The Activities of GATT 1960–61, at 29–30 (1961). *See also* Organisation of Economic Co-operation and Development, *Draft Convention on the Protection of Foreign Property and Resolution of the Council on the Draft Convention on the Protection of Foreign Property*, Oct. 12, 1967, OECD Publication No. 23081 (Nov. 1967), reprinted in 7 I.L.M. 117 (1968); Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

policies to increase the cross-border flow of goods, services, and capital investment. In 1951, the predecessor to the OECD, the Organization for European Economic Cooperation, adopted a Code of Liberalization of Current Invisible Transactions; in 1961, the OECD adopted the Code of Liberalization of Capital Movements.<sup>101</sup> The Codes were legally binding and required Member countries to notify:

the OECD of existing restrictions on foreign direct investment, capital movements and cross-border trade in services, not to introduce additional restrictions (except under specific conditions), to apply any measures without discrimination among OECD countries, and to submit themselves to a peer-review process that aims progressively to remove remaining restrictions over time.<sup>102</sup>

Over time, the Codes' membership and breadth of coverage have increased, reflecting the more general trend among nations of liberalizing their investment rules.<sup>103</sup> In 1989, for example, the Codes were amended to include banking, investment and financial services. Their obligations now "cover virtually all international capital flows, short term and long term, as well as the cross-border provision of financial services."<sup>104</sup> The 1976 Declaration of International Investment and Multinational Enterprises (including the Guidelines on labor rights discussed in the previous section) also touched on investments, requiring Member countries to accord to foreign enterprises within their borders terms no less favorable than those accorded in like situations to domestic enterprises.<sup>105</sup> The

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101. See Organisation for Economic Co-operation and Development, *Introduction to the OECD Codes of Liberalisation*, at <http://www.oecd.org/daf/investment/legal-instruments/codes.htm> (last modified Jan. 20, 2000); Organisation for Economic Co-operation and Development, *OECD Declaration on International Investment and Multinational Enterprises* (June 27, 2000), <http://www.oecd.org/daf/investment/guidelines/declarat1.htm> (last modified June 30, 2000).

102. Robert Ley & Pierre Poret, *The New OECD Members and Liberalisation*, OECD OBSERVER, Apr.–May 1997, at 38.

103. In 1961, the liberalization obligations "were essentially limited to the free disposal of non-resident-owned blocked funds and free transfers in connection with the making and liquidation of funds and free transfers in connection with the making and liquidation of inward direct investments." See HENDERSON, *supra* note 23, at 63 (quoting Pierre Poret, CAPITAL MARKET LIBERALISATION: OECD APPROACH AND RULES 4–5 (1998)). The Code was subsequently revised in 1964, to include "basic underlying transactions such as direct investment [and] certain long-term securities" and in 1984 "to cover the right of establishment of direct investors"; in 1989, the Code was amended "to cover all other capital movements, such as money-market transactions, operations in forward markets, swaps, options, and other derivative instruments." *Id.*

104. HENDERSON, *supra* note 23, at 7.

105. However, this provision did not cover all investors and lacked meaningful enforcement procedures and dispute settlement mechanisms.

Codes also permitted governments to enter reservations in order to restrict certain types of capital flows. Despite these weak provisions and nonexistent enforcement powers, by the early 1990s the OECD's Declaration of International Investment and Codes arguably provided *more* coverage of FDI matters than the agreements created by any other IGO. In the land of the blind, the one-eyed man is king. These agreements, however, were hardly the stuff of major controversy and few politicians, much less NGOs, even knew they existed. Why, then, was there such an explosive, though delayed, reaction to the MAI?

Multinational enterprises engage in FDI for a host of reasons that lower their costs of doing business—avoiding tariffs, reducing transport costs, securing access to natural resources, taking advantage of cheap labor, etc. The attractive benefits offered by FDI to host developing countries are also undeniable. For the host country, FDI can provide needed capital, spur technology transfer, create jobs, and increase domestic competition and foreign exchange. Since the late 1970s, governments both within and outside the OECD have reversed their traditional opposition to liberalization of FDI, increasingly warming to the role of inward direct investment and creating legal structures to attract further investment.<sup>106</sup> This has primarily occurred through the gradual removal of legal barriers and restrictions to capital movements, opening up previously restricted sectors to investors, eliminating performance requirements, offering attractive investment incentives, and implementing better protections for foreign investors.<sup>107</sup> Often, these policies have been expressed through BITs.

Most BITs provide the same basic protections—national treatment, most favored nation (MFN) treatment, prohibition of exchange controls, prohibition of uncompensated expropriation, and resolution of disputes by binding arbitration.<sup>108</sup> Importantly, BITs have not addressed linkages with other fields.<sup>109</sup> If the only concerns raised by FDI were expropriation of property and repayment of debts, this lack of linkages would make good sense. In practice, however, FDI can have a direct relation to labor, environmental and other social welfare concerns because the goals of MNEs and host countries may conflict. Notwithstanding their desires

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106. There are a variety of explanations for why this change in attitude and practice took place at that period rather than earlier. Kenneth Vandeveld examines a number of contributing factors. Vandeveld, *Sustainable Liberalism*, *supra* note 97, at 386–90.

107. HENDERSON, *supra* note 23, at 7, 24–25 (“From the early-to-mid 1980s, a growing number of countries, chiefly in Latin America and East Asia, took steps to relax or abolish restrictions on trade and capital flows.”). The two main areas of change have been exchange controls and restrictions on inward FDI.

108. Vandeveld, *Sustainable Liberalism*, *supra* note 93, at 374

109. In interviews, TUAC claimed that none of the 1600 BITs address labor issues.

to accommodate FDI, host countries may also seek to promote important local policy objectives. For example, in efforts to increase employment, countries may employ a range of operational restrictions (also known as performance requirements), such as mandating the hiring of local workers and limiting the ability of the company to employ foreign workers. For this reason, as well as concerns over sovereignty, developing countries have preferred negotiating BITs and, with few exceptions, have uniformly opposed strong multilateral rules liberalizing FDI under the auspices of the GATT or WTO.<sup>110</sup>

## 2. Movement Toward Negotiating an MAI at the OECD

During the Uruguay Round, a number of countries had sought to harmonize the patchwork of BITs through an MAI. The United States and others proposed a comprehensive investment agreement but faced concerted opposition from developing countries. The ultimate compromise, the Agreement on Trade-Related Investment Measures (TRIMS), addressed investment restrictions that directly affect trade flows in goods.<sup>111</sup> While it represented the first global agreement specifically directed at FDI since 1947, the TRIMS Agreement focuses narrowly on measures that distort trade, leaving the most important investment measures outside the agreement and, therefore, outside the scope of the WTO dispute settlement process.<sup>112</sup> Described by one commentator as “a useful if somewhat meagre result of five years of tough negotiation,” the TRIMS Agreement was not viewed at the time as a significant achievement, in part because it largely restated GATT law.<sup>113</sup> Several other Uruguay Round agreements, most notably the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects

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110. Burt, *supra* note 92, at 1016–17 (identifying the view of developing countries that “restrictive investment policy [is] a sovereign right and an element of national economic policy,” as well as their concerns about “abuse by multinational enterprises” and “loss of sovereign control,” as reasons for their resistance to a restrictive investment policy).

111. Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 1, 33 I.L.M. 1143, 1179–80 (1994) [hereinafter TRIMS Agreement].

112. There are several investment measures not covered by the TRIMS Agreement, including local equity requirements, technology transfer and licensing requirements, local manufacturing requirements, personnel entry restrictions, local employment requirements, remittance restrictions, and export performance requirements. Burt, *supra* note 92, at 1037–38. In particular, the lack of a prohibition on export performance “is a substantial failure of the agreement because export subsidies, which are closely related, are prohibited under the international trading system.” *Id.* The foci of the TRIMS Agreement are primarily local content regulations and trade-balancing conditions. HENDERSON, *supra* note 23, at 15.

113. HENDERSON, *supra* note 23, at 16 (quoting JOHN CROOME, *RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND* 309 (1995)).

of Intellectual Property Rights (TRIPS Agreement), created disciplines liberalizing FDI, but these only represented first steps, failing to address the bulk of FDI.<sup>114</sup>

Developing country opposition to a comprehensive investment agreement at the WTO has not weakened since the close of the Uruguay Round. In fact, when development of investment rules was again proposed at the WTO in 1996, opposition by developing countries blocked negotiations, leading to the weak compromise of new working groups on trade and investment and trade and competition policy to examine these areas more deeply.<sup>115</sup>

Against this backdrop of failure, after completing over 70 preparatory studies, CIME and the Committee on Capital Movements and Invisible Transactions (CMIT) reported to the OECD Council in 1995 that "the foundations have now been laid for the successful negotiation of . . . [an MAI] building on OECD's existing instruments and expertise."<sup>116</sup> Based on this advice, the Council decided to move from research of BITs to negotiation of the MAI. The stated goal was to complete the treaty by May 1997. A high-level negotiating group was established outside the directorate structure, serviced by DAFPE (primarily from CIME) secretariat staff. They were given a mandate to create an agreement that would

provide a broad multinational framework for international investment with high standard for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures [and] be a free-standing international

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114. The TRIPS Agreement addresses the transfer of technology through FDI, a common activity of multinationals in host countries). See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

115. Burt, *supra* note 92, at 1049 n.282 (identifying Bangladesh, Cuba, Egypt, Ghana, India, Indonesia, Kenya, Malaysia, Mauritius, Tanzania, Thailand, Venezuela, and Zimbabwe as the thirteen developing countries that expressed opposition to comprehensive investment talks in the WTO at a meeting of developing countries in New Delhi, India in September 1996 and pointing out that Pakistan and Sri Lanka also expressed their support for this position). See also *13 Developing Nations Oppose Investment Pact*, TIMES OF INDIA, Oct. 1, 1996, at 15; Frances Williams, *WTO Push for Investment Rules Pact: Developing Countries Divided Despite Ruggiero's Assertion of a "Compelling Case,"* FIN. TIMES (London), Oct. 17, 1996, at 4; Frances Williams, *US May Block WTO Draft*, FIN. TIMES (London), Nov. 4, 1996, at 6. Proposals for investment talks were raised again at the WTO Ministerial Meeting in Singapore at the end of 1996, and resisted by a group of developing countries including, in particular, India, Egypt, Malaysia and Uganda. HENDERSON, *supra* note 23, at 16.

116. HENDERSON, *supra* note 23, at 1.

treaty open to all OECD Members and the European Communities, and to accession by non-OECD Member countries.<sup>117</sup>

Drafting Groups and Preparatory Groups were established to address specific issues and flesh out areas of agreement before going to the main Negotiating Group in Plenary session. All the Member countries participated and, within two years, eight non-Member countries joined as observers.

From the outset, the Secretariat regarded the MAI negotiations as a technical harmonization exercise. Given the great deal of commonality among the many investment treaties, it was expected that the OECD secretariat would review the range of BIT texts, identify common features, and create a unifying draft that would form the basis of a general agreement. The MAI, it was hoped, would be the first comprehensive international investment treaty and would create uniform rules for FDI protection, liberalization, and dispute settlement. By creating a more level playing field than the bumpy terrain of BITs, the MAI would greatly reduce distortions to investment flows and therefore speed the growth of FDI, significantly promoting the liberalization of investment measures and performance requirements beyond the results of the Uruguay Round agreements. If adopted, the MAI would supersede the OECD Codes and the Declaration, replacing them with an agreement with substance and teeth.

It is important to remember that the OECD was chosen as the negotiating forum for the MAI by the Member countries, not by the OECD staff itself. When controversy erupted over the negotiations in 1997, many criticized the selection of the OECD as a negotiating forum as a dubious choice, at best. In many respects, though, this was an eminently reasonable decision, for the OECD seemingly offered three comparative institutional advantages over rival negotiating fora.

First, the goal of the negotiations was consistent with the OECD's founding goal. From the earliest days of the OEEC and the successor OECD, the organization had served as a forum for liberalizing trade and capital flows, most notably through the Codes of Liberalization and the National Treatment Instruments in the Declaration. Second, as discussed in the introduction to this section, the OECD had much greater in-house expertise (in particular the DAFWE Secretariat in CIME and CMIT) on international investment issues than the other relevant IGOs, particularly the trade-focused WTO and UNCTAD. This was the same organization,

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117. HENDERSON, *supra* note 23, at 2.

after all, that had drafted the Investment Codes in the first place.<sup>118</sup> It is clear from interviews with OECD staff that, while the OECD secretariat and Member countries generally expected that this exercise would result in upward harmonization, they emphatically did *not* view the project as a politically contentious issue. The Secretariat involved considered the undertaking a strictly *analytical* project that made use of the OECD's substantial institutional knowledge.

In retrospect, given the failure to resolve these issues at the WTO, this blind eye to controversy seems surprising. Yet neither the Member countries nor the secretariat expected that the project would involve labor or environmental concerns, much less that it would become an international political lightning rod for the opponents of globalization.<sup>119</sup> Indeed, until very late in the process, the research and negotiations involved solely investment experts. ELSA and the Environment Directorate were not asked for advice for the simple reason that their fields of expertise were not seen as relevant.

Second, the OECD had a successful record in hosting international negotiations. As described in Part I, OECD Recommendations and Decisions are adopted every year, often involving intensive negotiation among Member countries. Moreover, the OECD has served as the forum for complex multilateral negotiations of freestanding treaties. During the same period as the Wider Investment Instrument Project, for example, the OECD successfully served as the negotiating forum for an international bribery convention.

Finally, and perhaps most important, the OECD's restricted membership increased the likelihood of success. Aside from the newest members, all the OECD governments had worked closely together in the past for the purpose of liberalizing investment flows and could be expected to favor an MAI. After all, by the time of the MAI all the OECD Member countries had removed exchange controls and further rolled back restrictions on inward FDI through unilateral steps or as part of

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118. As described above, however, a number of the agreements in the Uruguay Round had also dealt with investment issues, in particular the TRIMS Agreement, the TRIPS Agreement, and GATS. The OECD did not hold a monopoly on investment policy expertise.

119. In what now seems a foreshadowing of problems to come, the negotiations were originally referred to as the Multilateral Investment Agreement. Realizing that the acronym ("MIA") would make it too easy to lampoon the agreement as "Missing In Action," the United States persuaded the Secretariat to opt for the more neutral acronym of MAI. See Email from Roy Jones, TUAC Senior Policy Advisor, to James Salzman, Associate Professor of Law, Washington College of Law (Aug. 2, 2000) (on file with author).

regional trade agreements within the EU and NAFTA.<sup>120</sup> OECD Members accounted for 85% of all FDI outflows.<sup>121</sup>

While none of the OECD interviews mentioned this, it seems likely that the concerted opposition by developing countries in the WTO provided a strong incentive to negotiate the MAI at the OECD. If it were not possible to gain broad developing country support for global investment rules, then negotiations at fora with inclusive membership such as the WTO or UNCTAD would prove fruitless. The like-mindedness of OECD Member countries is the *raison d'être* for the organization's existence. Why not, then, commence MAI negotiations in a forum where success seemed more assured? It is interesting to note that the OECD Council's decision to commence negotiations of the MAI came shortly after the Final Act of the Uruguay Round. In retrospect, the shift of investment negotiations from the WTO to the OECD certainly suggests a causal influence.<sup>122</sup>

### 3. The Negotiations

This progress in fostering FDI, however, posed an obstacle to negotiations, for the main concern of the negotiating parties lay not in further liberalizing investments *within* the OECD. As Rainer Geiger, Deputy Director of the Directorate for Fiscal, Financial and Enterprise Affairs during the MAI negotiations has noted, "[b]y 1995, almost all exchange controls on capital accounts and most horizontal restrictions on foreign investment (i.e. authorization procedures for all categories and sectors) had disappeared within OECD member countries."<sup>123</sup> The goal of the MAI was not simply to strengthen the OECD Codes. Rather, it appears that the goal of the MAI negotiations was to open up FDI opportunities

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120. See HENDERSON, *supra* note 23, at 3, 8-9.

121. See Picciotto, *supra* note 93, at 744.

122. It is instructive to contrast the strong institutional reasons for basing the MAI negotiations at the OECD with the apparently trivial benefits the OECD offered as a forum for the OECD Export Credit Arrangement.

In the case of the Arrangement . . . the norms and rules of the OECD, under whose aegis the regime functions, seem to have had little effect on the negotiations. At various times, the issue was negotiated at G-5 (later G-7) summit meeting, IMF meetings, GATT, the Berne Union, and the OECD. The OECD became the institutional home of the regime largely because—unlike GATT, whose institutional design actually threatened to impede cooperation in this area—it offered a neutral forum. The OECD contributed neither a set of metanorms nor opportunities for issue linkage, but simply a location for treasury and credit agency officials to continue what they were already doing.

Moravcsik, *supra* note 8, at 198.

123. Rainer Geiger, *Towards a Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 467, 468 (1998).

in *developing countries* that restricted FDI—countries that, by definition, were not members of the OECD. Given this, one might well ask why the OECD would be an attractive venue to negotiate a treaty, when the most important signatories would *not* be OECD members?

The OECD Member countries appear to have adopted what might be called a “build it and they will come” strategy of treaty development.<sup>124</sup> From the outset, it was expected that the MAI would be a free-standing treaty open to accession by non-Member countries on a negotiated basis. In many respects this was no different from the history of the GATT. The original contracting parties in 1947 surely expected that other countries would accede to the treaty and adopt the GATT’s disciplines as the benefits of liberalized trade become clear. Nor did the Treaty of Rome and subsequent European Community and Union treaties dissuade hopeful applicants for membership despite the requirement that the established laws must be accepted as a condition to accession.<sup>125</sup> It was the explicit strategy of some of the Member countries (and certainly of the EU) to use the result of OECD negotiations as the basis for an even broader WTO agreement on direct investment.<sup>126</sup> The communiqué from the 1996 OECD ministerial meeting, in fact, declared the Member countries’ “interest in beginning an examination of trade and investment in the WTO and working towards a consensus, perhaps including the possibility of negotiations.”<sup>127</sup>

Though not well known, a similar strategy had been followed at the OECD in the 1980s in the field of transboundary movements of hazardous waste. Seeking to avoid the contentiousness and potential grandstanding by the more broad-based membership of UNEP, the Environment Directorate facilitated the negotiation and passage of a series of low-profile OECD decisions restricting the export of hazardous waste from Member countries. These decisions formed the basis for later negotiations conducted by U.N. Environment Program (UNEP) for the

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124. See HUNTER, SALZMAN, & ZAELKE, *supra* note 5, at 267.

125. The recent land mines convention provides a variant on this. The first negotiating conference concluded with fifty nations pledging to ban landmines, yet the final treaty, a little over a year later, had over a hundred signatories. *Id.*

126. In the May 1997 draft of the MAI, the EU inserted language to this effect. See Organisation for Economic Co-operation and Development, *The MAI Negotiating Text (as of 24 April 1998)*, at Preamble (1998), available at <http://www.oecd.org/daf/investment/fdi/mai/maitext.pdf> (last modified Mar. 16, 2000) (“Wishing that this Agreement enhances international co-operation with respect to investment and the development of world-wide rules on foreign direct investment in the framework of the world trading system as embodied in the World Trade Organization.”) [hereinafter MAI Negotiating Text]. See also Burt, *supra* note 92, at 1018.

127. William Witherell, *An Agreement on Investment*, OECD OBSERVER, Oct.–Nov. 1996, at 7–8.

agreement that eventually became the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and the Disposal.<sup>128</sup> To assume simply that what had worked before in the context of hazardous waste would work again, however, does beg the question of why developing countries would sign a treaty they had not negotiated. To later critics of the MAI negotiations, the “build it and they will come” model of treaty formation was simple arrogance on the part of developed nations.

The divergence of views justifying the OECD as the site for the MAI—institutional competence versus restricted membership—is striking. Perhaps it simply reflects the chimeric nature of the MAI story, but after interviewing participants one is left with near schizophrenic confusion. From the secretariat’s perspective, the negotiations were viewed as a dull, uncontroversial, technical exercise of harmonization, best performed by technocrats within the OECD. From an outsider’s perspective, the OECD’s selection as the forum for the MAI smacks more of a cunning plan to encourage liberalization of developing countries’ FDI controls by *circumventing* developing country participation in the drafting of the text.

This last charge may be overly harsh, however, for the shadow of the WTO was always in the negotiating room. Non-Member countries were invited to participate as observers and, a year after negotiations had commenced, eight nations were actively involved.<sup>129</sup> The meetings were also open to WTO observers and to the International Monetary Fund and World Bank when the agenda concerned their interests. Interestingly, though, no similar invitation was extended to UNCTAD, which had been directed by its members in 1996 to work on a “possible multilateral framework on investment.”<sup>130</sup>

Moreover, despite the later assertions of MAI critics, MAI negotiations were never concealed or held covertly. To the contrary, the activities were announced in OECD press releases, articles were published in the organization’s magazine, the *OECD Observer*, and many of the conference papers were posted on the OECD Internet website created for the MAI in June 1996. Indeed the OECD held an early press conference to discuss issues concerning negotiation of the MAI and no one showed up. This confirmed CIME’s view that negotiation of the MAI

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128. See HUNTER, SALZMAN, & ZAELEKE, *supra* note 5, at 860–62 (recounting the history of the Basel Convention).

129. These included Argentina, Brazil, Chile, Estonia, Hong Kong, China, Latvia, Lithuania, and the Slovak Republic.

130. HENDERSON, *supra* note 23, at 20. This snub further supports the possibility that choice of the OECD as a negotiating forum was influenced by its restrictive membership.

was purely a technical harmonization exercise and that there was no public interest in the matter.<sup>131</sup> With the exception of NAFTA, which is more a trade than an investment treaty, none of the previous BITs had ever been met with outrage or even interest by NGOs. Given this intense indifference to the MAI from the outset, why did an effective global coalition of labor, environmental, and other groups formed explicitly against the MAI just two years later?

#### 4. The Tide Turns: Concerted, International Opposition by Civil Society

The draft MAI, as originally proposed, was based upon the principles of national treatment, most favored nation treatment, and transparency. It would have restrained governments from treating foreign and local investments differently, moving closer to a baseline of non-discrimination. Unlike the TRIMS Agreement, the MAI had a wide scope, broadly defining both FDI and the range of “investment-distorting” measures.<sup>132</sup> The agreement sought to harmonize upward by creating mechanisms addressing standstill and rollback of investment measures.<sup>133</sup> Indeed the MAI was less an attempt to regulate FDI than an effort to *deregulate* FDI flows. It is beyond the scope of this study to examine the MAI’s text in detail, but it is important to recognize that, despite the reassurances of its proponents, the MAI did more than simply harmonize BITs. Three substantive concerns need to be explained in order to understand the concerted opposition by NGOs.

The first concern, focusing on style, has already been discussed. By deliberately choosing a forum that *excluded* developing countries, the OECD Member countries sent a message, intentional or not, that other countries had no place at the table. While non-Member countries were

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131. In a revealing anecdote on how low-profile the MAI exercise was in the international policy community, a member of the OECD secretariat related that she was at a U.N. Commission for Sustainable Development meeting in 1996 when an NGO participant started denouncing the MAI negotiations as not being transparent. Ironically, the brunt of her ire was directed not at the OECD but at the European Union, since she repeatedly referred to the MAI as an “EU or EC instrument.” Email from Marilyn Yakowitz, Centre for Co-operation with Non-Members, OECD, to James Salzman, Associate Professor, Washington College of Law (October 2, 2000) (on file with author).

132. The MAI defined investment as “every kind of asset owned or controlled, directly or indirectly by an investor.” MAI Negotiating Text, *supra* note 126, at Art. II(2)(i). This included “an enterprise,” shares, bonds, rights under contracts, claims to money, intellectual property rights, and “any other tangible and intangible, movable or immovable property and any related property rights.” *Id.* The TRIMS Agreement, in contrast, regulates only investments with trade-distorting measures.

133. Standstill measures prohibit the introduction of additional non-conforming measures. Rollback measures allow only future liberalization of measures.

permitted to participate as observers and to accede to the final free-standing treaty, this expressly was not their forum.<sup>134</sup> It left the negotiations open to the charge, merited or not, that the proceedings were secretive because there was something to hide.

The second substantive concern was one of balance. The MAI clearly gave new rights to MNEs. These included not only national treatment, MFN, and an expansion of the Hull formula's coverage from property to contractual rights but also, as will be described below, binding dispute settlement provisions. The potential benefits for MNEs were obvious: fewer restrictions on placement (and removal) of their investments. What would nations receive in return for giving up sovereign control over inward investments? One could argue that the quid pro quo would arise in the form of greater flows of FDI, increased economic growth, and improved social welfare from this new wealth. This was a variant on the refrain that "a rising tide lifts all boats," heard so often in trade and development debates. But there was very real concern that the MAI without linkages, that is without explicit social, labor and environmental protections, created investors' rights without balancing them with similar responsibilities. Focusing on rights and ignoring counterbalanced obligations would create a one-sided agreement. As the Canadian Labor Council charged, the MAI was:

a 'charter of rights for corporations.' It's all about trade, and it ignores society, the environment and human need. . . . [It] gives rights to investors and corporations but requires nothing in return. The MAI puts no obligations on corporations to create jobs, respect workers' rights or protect the environment. . . . Many Canadian governments give subsidies, tax breaks and other support to Canadian companies to support job creation, training, research and development. The MAI calls this 'discrimination' against foreign investors and would stop it. The MAI may even go further and prohibit government rules that say companies receiving public dollars must create jobs in return.<sup>135</sup>

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134. A more subtle point bears mentioning, as well. While its proponents claimed that the MAI simply harmonized the points in common among existing BITs, the multitude of BITs were "bottom up agreements," with key terms negotiated between each country on an ad hoc basis. The MAI, by contrast, was explicitly intended as a "top down" agreement, setting the same basic terms for all investment agreements.

135. Canadian Labour Council, *MAI Alert: What the MAI Means for Workers*, at <http://www.clc-ctc.ca/news/3worker.html> (last modified June 30, 2000) [hereinafter Canadian Council]. As a columnist in the *San Francisco Bay Guardian* wrote, "[u]nder [the] MAI, local, regional, and federal governments could no longer make low-interest loans to local businesses, cut taxes for businesses that hire members of local communities, or give minority-owned or environmentally conscious companies preference in the awarding of public-works

The European Parliament adopted a resolution framing the issue in starker terms, stating that the draft MAI “reflects an imbalance between the rights and obligations of investors, guaranteeing the latter full rights and protection while the signatory states are taking on burdensome obligations which might leave their populations unprotected.”<sup>136</sup>

What omissions were these critics referring to? The largest concern centered on corrosive competition—the fear that in some cases thirst for FDI can lead to a race-to-the-bottom among countries as local and national governments lower social and environmental standards in competition to attract foreign investment. The tax breaks offered by U.S. states bidding for a new car plant provides an obvious example of fiscal competition.<sup>137</sup> Labor groups charge that some countries also use their lack of labor rights as an incentive for companies to invest.<sup>138</sup> The downward pressure on environmental standards to attract FDI has been a source of heated controversy, as well.<sup>139</sup>

A prime example of the MAI negotiations’ failure to address the potential of a race-to-the-bottom was its treatment of investment incentives—the lowering of labor or environmental standards as a means to attract FDI. This issue had been addressed directly in NAFTA Article 1114(2), which provided that parties should not waive or derogate from health, safety and environmental measures in order to encourage “the establishment, acquisition, expansion, or retention in its territory of an investment or an investor.”<sup>140</sup> Labor and environmental groups were concerned that absent similar safeguards in the MAI, countries might lower

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contracts.” Gabriel Roth, *NAFTA on Crack*, S.F. BAY GUARDIAN, <http://www.sfbg.com/News/32/03/Features/mai.html> (Oct. 15, 1997). As discussed *infra* notes 159–160, it is not at all clear that the MAI would have prohibited these activities. As another critic observed,

the MAI draft text is woefully lacking in labor rights substance. Negotiators set forth no clear norms of behavior for governments or multinational investors, created no binding obligations on them, set up no mechanism to scrutinize government or enterprise treatment of workers, and established no penalties, economic or otherwise, when investors violate workers’ rights. Second, the MAI lags far behind other international trade regimes and their more extensive and sophisticated treatment of labor rights. Fifteen years ago, the MAI’s labor rights language might have been worthy of attention. Today, it has been overtaken by developments in the labor rights field that make the MAI negotiators’ attempts at dealing with labor rights seem shallow.

Compa, *supra* note 53, at 687.

136. HENDERSON, *supra* note 23, at 40.

137. Allen R. Myerson, *O Governor, Won’t You Buy Me a Mercedes Plant?* N.Y. TIMES, Sept. 1, 1996, at C1.

138. See, e.g., Charnovitz, *supra* note 66, at 141–42.

139. See, e.g., Richard L. Revesz, *Federalism and Environmental Regulation: Lessons for the European Union and the International Community*, 83 VA. L. REV. 1331 (1997).

140. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 612.

protective standards. And even if countries did not actively lower standards to entice investment, this provided no reassurance against a 'chilling' effect—pressure not to strengthen labor and environmental standards out of concern over potential loss of FDI.<sup>141</sup>

The MAI's dispute settlement provisions provided a further cause for NGO concern. Few would argue that the dispute settlement provisions of the WTO provide the teeth that give the new institution a fearsome bite. Even the provisions provided in the earlier GATT, while vulnerable to veto by a Member country, still gave the trade regime greater sanctioning influence than other institutional frameworks. Following this model and that of the NAFTA (as well as strong lobbying from the United States), the MAI proposed a binding dispute settlement process. As described earlier, expropriation has long been a worry for foreign investors. The MAI addressed this issue head on, prohibiting direct confiscation of assets as well as "any other measure or measures having equivalent effect."

Critics, however, feared that investors would make use of this provision to file claims for compensation resulting from regulatory takings, claims not available to local counterparts. Canada's experience under NAFTA provided a sobering preview of how such investor protections could play out. In 1997, the Canadian government banned the use of a fuel additive, MMT, which was a source of harmful air pollutants and whose use was already restricted in the United States. The manufacturer, the Virginia-based Ethyl Corporation, sued for \$251 million, claiming that the regulatory action had been the equivalent of a confiscation of its assets. Fearful of losing the case, the Canadian government settled the suit for \$13 million.<sup>142</sup> California recently announced it would phase out the use of the gasoline additive, MTBE, because leaks from pipes had contaminated the ground water in Santa Monica, Lake Tahoe and 10,000 wells throughout California. Methanex Corporation, the Canadian manufacturer of MTBE, saw its stock drop \$150 million in the days following the announcement and has filed a suit through NAFTA for \$970 million.<sup>143</sup>

In each of these cases and others pending,<sup>144</sup> foreign companies have filed suit seeking compensation for actions they claim amount to expro-

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141. See generally Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L L. 639 (1998).

142. See Alan Swan, *International Decision: Ethyl Corporation v. Canada, Award on Jurisdiction*, 94 AM. J. INT'L L. 159 (2000).

143. Samrat Ganguly, *The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health*, 38 COLUM. J. TRANSNAT'L L. 113, 150 (1999).

144. As of late 1999, eight investment claims had been brought under NAFTA. For example:

priation in settings where domestic companies in the same situation would clearly have no cause of action. The American producers of MTBE have no regulatory takings claim in the United States. As a leading Canadian paper's editorial stated, "that puts the right of foreigner corporations to make profits on an equal footing with a country's duty to protect the health of its people."<sup>145</sup> Echoing this concern, the Canadian Labor Council charged that under the MAI,

corporations will have the right to launch expensive challenges, and demand compensation for government policies in front of international trade disputes panels. These panels are non-elected and inaccessible—they care only about narrow trade issues, not broader social goals.<sup>146</sup>

TUAC was the first labor group to become involved in the MAI negotiations, and recognized early the potential implications of the agreement for labor rights. It started providing its opinions to the MAI negotiators in 1996, though its recommendations were ignored initially. TUAC initially called for the inclusion of four elements:

- incorporation of the OECD Guidelines for Multinational Enterprises in the preamble and annexing the full text of the Guidelines;
- a binding obligation for all MAI parties to create National Contact Points to implement the Guidelines;

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A U.S. company running a hazardous waste disposal facility in Mexico is seeking \$90 million in compensation from Mexico for losses incurred when the local government refused to permit operation of the plant because of its discovery that the local geology made it likely that the waste treated at the plant would contaminate local water supplies. Another U.S. toxic waste disposal company has claimed that Canada should pay it at least \$10 million for losses arising out of a 15-month Canadian ban on the export of a particularly volatile hazardous waste. . . .

. . .

The Loewen Group, a Canadian funeral services firm, brought a NAFTA investment claim against the United States after it lost a civil contract suit brought by a competing US funeral services company in Mississippi court. The court awarded the US company \$500 million and Loewen, which had filed for bankruptcy, was unable to pay the requisite 125% bond to appeal the case. Loewen brought the NAFTA claim on the basis that the suit against it violated NAFTA's national treatment, minimum treatment and expropriation provisions.

J. Martin Wagner, *Nature Beyond the Nation State Symposium: International Investment, Expropriation and Environmental Protection*, 29 *GOLDEN GATE U. L. REV.* 465, 466, 487 (1999).

145. *NAFTA Has Become Pollution Permit*, THE TORONTO STAR, June 21, 1999, available at LEXIS, All Sources, News File.

146. See Canadian Labour Council, *supra* note 135.

- a commitment in the preamble to protect, enhance and enforce basic workers' rights;
- and a binding obligation that parties will not seek to attract foreign investment by suppressing domestic labor standards or violating internationally recognized workers' rights.<sup>147</sup>

On its face, inclusion of the OECD Guidelines and requirements to create National Contact Points would seem uncontroversial since the Guidelines had been formally adopted by the same body almost two decades earlier. The Guidelines' status would remain unchanged; they would remain voluntary within the binding MAI. TUAC hoped inclusion would energize the dormant Guidelines, raising their profile and providing labor activists with a renewed impetus to direct the conduct of MNEs. Those opposed to inclusion of the Guidelines and obligations to create National Contact Points, in particular Australia, New Zealand and Mexico, argued that linkage was inappropriate and the ILO was the proper forum to address labor issues.<sup>148</sup> Others in the MAI negotiating group contended that "it is neither appropriate nor possible for the MAI to interfere with the private practices and decisions of specific companies. . . . What private entities decide to do in their own right is not, and should not according to the majority, be covered by MAI."<sup>149</sup> Indeed in early informal discussions between the TUAC and OECD secretariats on addressing labor issues in the MAI, TUAC was told it "was pushing yesterday's agenda." Before the explosion of NGO interest, TUAC was told that the only deal that might be possible would have to make unambiguously clear that the Guidelines were non-binding. In the event that governments agreed to incorporate the Guidelines in the MAI, they could only be annexed to the Final Act of the MAI (which would in effect be a preamble to the preamble) and not to the Agreement itself.

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147. This last provision was based on the provision in Article 1114 of NAFTA that forbids the lowering of standards to attract investment, although it is stricter. Article 1114's requirement is hortatory ("should") while TUAC called for binding language ("will"). Trade Union Advisory Committee, Organisation of Economic Co-operation and Development, *The Multilateral Agreement on Investment: The Treatment of Labour Issues, TUAC Briefing Note – February 1997*, <http://www.tuac.org/statement/communiq/maj01.htm> (last modified June 27, 1998).

148. HENDERSON, *supra* note 23, at 45. This argument against linkage is similar to the debate over the introduction to the *Labour Standards Study*, discussed *supra*, as well as debates heard in the WTO about environmental policy maintaining that multilateral environmental agreements are the proper means to address environmental issues, rather than agreements in the WTO.

149. Burt, *supra* note 92, at 1047 n.262 (quoting Anders Ahnliid, *Special Topics, in MULTILATERAL AGREEMENT ON INVESTMENT: STATE OF PLAY AS OF JULY 1996* 4, 20, OECD Doc. OCDE/GD(96)157 (1996)).

It is important, though, to recognize that TUAC *never* publicly opposed the MAI. They saw their role not as trying to kill the MAI but, rather, in serving as a constructive voice of labor opinion and expertise and in using their periodic place at the table as a source of information and indirect participant in the negotiations. The first TUAC Plenary Session following the launch of negotiations in May 1995 adopted a twin track negotiating strategy. The national affiliates would lobby their own governments and join coalitions with civil society groups. TUAC would push for the strongest possible language on labor issues, but not state its support or opposition for the MAI until its final substance became clear. This challenging but nonconfrontational role was seen as essential to ensuring long-term credibility with the Member countries and within the OECD. As TUAC's Senior Policy Advisor has described,

On something like the MAI, we neither sought, nor would affiliates have wanted us to "negotiate" on their behalf on the MAI as a whole. The OECD is not a tripartite body like the ILO. So we can't negotiate and trade issues off. Our input is more subtle and depends on our ability to convey a message to government people in Paris and the OECD Secretariat at all levels as to what's workable and what our people will accept. By opposing the MAI we would have lost that channel of influence and a lot of credibility because by saying no, governments could have legitimately ignored us as we would have nothing to contribute. . . . They could have said "what's the point in discussing this as TUAC has said no." Also, by trying to carve out a position that all can agree to, an organization tends to get the lowest common denominator prevailing. . . .<sup>150</sup>

It was taken as a given that developed countries would move toward a MAI somewhere, and TUAC thought that labor's influence would likely be *greater* at the OECD than the WTO, the likely alternate forum. From this perspective, ironically, TUAC's strategy of building an agreement within the OECD prior to negotiations at another forum paralleled the strategy of the OECD Member countries. Outside the negotiations, TUAC served as an important clearing-house of information for labor groups and worked closely with active NGOs such as the

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150. Email from Roy Jones, TUAC Senior Policy Advisor, to James Salzman, Associate Professor, Washington College of Law (August 2, 2000) (on file with author). Loss of credibility would also have increased the probability of TUAC being denied access to documents. This access is particularly important when national affiliates are denied access by their governments (as was often the case with the MAI).

World Wide Fund for Nature and Amnesty International in developing strategies to amend the draft agreement.

While TUAC never publicly opposed the MAI, other NGOs did, and did so effectively. Speaking to those involved in the campaign, many described the NGO opposition as a wildfire. Indeed, the rapidity and effectiveness of NGO opposition to the MAI was unprecedented. From the end of 1995, a small number of NGOs started to follow the negotiations and oppose both the goals and content of the MAI process. At the start, these were primarily environmental and social rather than labor groups. Labor groups were not far behind, however. The OECD held an informal meeting with interested NGOs in December of 1996. While the OECD was open in terms of announcing the process of the negotiations and their general status, in keeping with OECD procedures the internal documents were restricted. In February 1997, however, the Public Citizen group, founded by Ralph Nader, got hold of the current Chairman's draft (i.e., the consolidated negotiating text up to that point) and posted it on the Internet.<sup>151</sup> This posting provided the catalyst for widespread and hard line opposition of NGOs against the MAI. Just two months later, a more formal meeting for NGOs was hosted by members of the Negotiating Group and secretariat officials. While the OECD's first consultative meeting with interested groups about the MAI had been in an empty room, the October briefing attracted over 70 representatives from 30 groups around the world.<sup>152</sup> In a matter of mere months, through the Internet and e-mail, a global campaign against the MAI had come into being. Drafts and bulletins on the MAI were now regularly posted on a host of NGO websites.<sup>153</sup> By 1998, anti-MAI campaigns were active in more than half of the OECD countries as well as many developing countries.<sup>154</sup> The mood of these activities is well captured in the description of the Preamble Collaborative, an NGO with only three employees.

The Preamble Collaborative was one of more than 600 organizations in nearly 70 countries expressing vehement opposition to the treaty, often in apocalyptic terms. The Collaborative's extensive World Wide Web site—featuring fact sheets, congressional testimony, position papers, and issue briefs—was part of a tidal wave of electronically amplified public opposition to the

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151. Stephen J. Kobrin, *The MAI and the Clash of Globalization*, FOREIGN POL'Y, Fall 1998, at 97–98.

152. HENDERSON, *supra* note 23, at 22.

153. See, e.g., Global Trade Watch, Public Citizen, *Stop MAI . . . and No MAI in IMF, WTO, FTAA, or TAFTA!*, at <http://www.citizen.org/pctrade/MAI/maihome.html> (last updated Jan. 3, 2000).

154. HENDERSON, *supra* note 23, at 27.

MAI. . . . Suddenly, what had been a working document among 29 parties became available to anyone with a computer and a modem. And everyone with a computer and a modem got involved. OECD representatives quickly became the targets of unprecedented scrutiny. "If a negotiator says something to someone over a glass of wine, we'll have it on the Internet within an hour, all over the world," boasted the head of the Council of Canadians, a citizens' interest group claiming more than 100,000 members.<sup>155</sup>

NGOs repeated the main substantive arguments against the MAI described above and expressed a more general anxiety that the MAI represented yet another significant step in the rush toward greater globalization, ignoring issues beyond trade flows and commerce. Reflecting this concern, much of the anti-MAI criticism came to voice the rhetorically powerful charge that a critical negotiation with impacts on the lives of people around the world was being negotiated in secret by a secretive institution. The claim of a shadowy international organization creating the "New World Order" resonated powerfully among those with reservations about the pace and consequences of globalization.<sup>156</sup> Was this mere rhetoric? Certainly, to some NGOs, the lack of specificity provided on the terms of the MAI negotiations provided clear evidence that it was a closed-door operation.

On top of these occasional hyperbolic assertions, it must be added that a number of NGOs made claims with no basis in fact at all. There were assertions that the MAI would establish protectionist standards against developing countries and that if the MAI had been in force Nelson Mandela would still be in prison.<sup>157</sup> It is not news, of course, to observe that the advent of the Internet and e-mail is revolutionizing the techniques and influence of NGOs, permitting the creation of global campaigns remarkably quickly. The experience of the MAI is a case in point that the increased ease and rapidity of information dissemination applies equally to misinformation.<sup>158</sup> In this setting the OECD's lack of experience in managing highly contentious negotiations proved fatal. As the OECD's Secretary-General later acknowledged, the OECD was

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155. Kobrin, *supra* note 151, at 97.

156. The Canadian NGO, the Council of Canadians, for example, asserted that "this global investment treaty constitutes a power grab for transnational corporations that would end up hijacking the fundamental democratic rights and freedoms of peoples all over the world." HENDERSON, *supra* note 23, at 37.

157. Kobrin, *supra* note 151, at 104.

158. See James Salzman, *Beyond the Smokestack: Environmental Protection in the Service Economy*, 47 UCLA L. REV. 411, 466-67 (1999) (describing the growth and implications of NGO virtual campaigns).

badly outgunned in the world of public relations. The OECD's reaction to growing NGO attacks—more press conferences and enhancing the MAI home-page on its website—had the same effect as whistling into a storm.

The impact of a global NGO campaign against the MAI was quickly felt. By the time the Chairman's draft was issued in early 1998, with the exception of mandating National Contact Points, most of TUAC's demands had been met.<sup>159</sup> Despite earlier protests by some Member countries, text was inserted to prohibit the lowering of social and environmental standards to attract FDI, to ensure that treaty obligations would not prevent governments from maintaining (or heightening) protective social and environmental standards, and to ban claims by foreign

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159. The four TUAC demands excerpted earlier were placed on their website early during the negotiations (before TUAC had seen a negotiating draft). Additional demands (excerpted below) were provided to TUAC national affiliates in the late Summer of 1997, after the MAI had risen to international prominence and the Chairman's draft had been leaked. It is interesting to note that TUAC's demands had gone beyond purely labor issues. Their basic demands for an acceptable MAI included:

1. Strong reference to core labour standards in the Preamble, and to any future ILO Declaration on core labour rights, but no reference to the ILO as the *only* competent body to deal with them. A binding clause on core labour standards subject to dispute settlement, and/or accession to the agreement to be dependent on proven adherence to core labour standards.
2. Binding clause on domestic labour standards, subject to dispute settlement, and covering all investments and investors, not specific ones. A binding clause covering environmental standards.
3. The OECD Guidelines to be annexed to the MAI itself and not the Final Act. The requirement to set up National Contact Points to be obligatory on all Parties to the Agreement, with no national exemptions. Competence for the Guidelines to be passed to the Parties Group dealing with the MAI. Any forthcoming Review of the Guidelines to focus, *inter alia*, on tightening up the implementation process.
4. A strong government's "right to regulate" clause, and further revisions as regards "performance requirements".
5. Further revisions to dispute settlement procedures, (deleting investor to state), and a mechanism to be found to allow trade unions to bring forward complaints, and this to be clarified in relation to point 6.
6. Further work on the "expropriation" clause, including that as regards measures "tantamount to expropriation" and to ensure that strike action, among other things is specifically excluded from its coverage.
7. Revise the general exception clause on monetary and exchange rate policies, BOP, and capital transactions so as to allow the imposition of capital controls, for example Chile type "speed bumps" as a general rule.
8. Open ended exceptions, i.e., not subject to standstill and rollback, must be allowed as a general rule, including those specifically for public and not for profit sectors including health and social services, education and public procurement.

investors for compensation for losses caused by non-discriminatory regulatory actions.<sup>160</sup>

These concessions, however, came too late, for the NGO campaign had taken on a life of its own in domestic politics. In early 1998, seeking to resurrect the chances of renewed Fast Track authority from Congress, the Clinton Administration sought NGO support by denouncing the MAI as “fatally flawed” and demanding that it be reconsidered. Domestic opposition also flared up in Paris, where demonstrations in February took aim at the impact of the MAI on France’s ability to protect its cultural heritage.<sup>161</sup> In response, the MAI negotiations were formally suspended for six months for a period of assessment by the negotiating parties. On October 14, one week before negotiations were scheduled to resume, Prime Minister Jospin of France released an official statement in the Chamber of Deputies, declaring that since the MAI posed “fundamental problems with respect to the sovereignty of states” and was in its current

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159. The late draft of the MAI addressed labor rights in three separate provisions. The preamble provided that parties renewed “their commitment to the Copenhagen Declaration of the World Summit on Social Development . . . and to observance of internationally recognized core labour standards,” recognized that the ILO was the appropriate body to set and enforce such standards,

In the body of the text, in the section “Not Lowering Standards,” the text stated it was “inappropriate” for a party “to encourage investment by relaxing. . . [core] labour standards” and, if this occurred, “if a Party considers that another Party has offered such encouragement, it may request consultations with the other Party, and the two Parties shall consult with a view to avoiding any such encouragement.” A bracketed alternative proposed a party “[shall][should] not waive or otherwise derogate from. . . [domestic] labor standards” to encourage foreign investment in the country.

Finally, an annex was proposed describing the OECD Guidelines as “a joint recommendation by participating governments to multinational enterprises operating in their territory . . . to help multinational enterprises ensure that their operations are in harmony with other national policies of the countries in which they operate that encouraged parties” and encouraging parties “to participate in the Guidelines work of the [OECD] in order to promote cooperation . . . and to facilitate the maintenance of consensus.” See Organisation for Economic Co-operation and Development, CHAIRMAN’S NOTE ON ENVIRONMENT AND RELATED MATTERS AND ON LABOUR, OECD Doc. DAF/MAI(98) 10, Mar. 11, 1998, available at <http://www.oecd.org/daf/investment/fdi/mai/labenv.htm> (last modified Feb. 18, 2000). See generally Compa, *supra* note 53, at 686–87.

The main outstanding point was over how to treat violations of core labor standards. At this point in the negotiations, the ILO had not yet adopted its Declaration on Fundamental Rights and Principles at Work, so the OECD’s *Labour Standards Study* was the most authoritative identification of core rights (freedom of association, rights to collective bargaining, etc). The Chairman’s draft envisaged consultations to address violations of core labor rights, not a binding dispute settlement mechanism. Apparently Mexico (which had dealt with similar issues in NAFTA), New Zealand, and the United Kingdom strongly opposed such a mechanism, arguing that this clause would prevent developing countries from joining any eventual MAI, something that the OECD as a whole feared. In interviews for this article, TUAC equally strongly stated that it would have opposed the MAI if provisions for binding dispute settlement had not been included.

161. HENDERSON, *supra* note 23, at 30.

state “unreformable,” that France would pull out of the negotiations. One of the MAI’s strongest early proponents, France held out the possibility of resuming negotiations but only on “an entirely new basis.”<sup>162</sup> Its abandonment of negotiations meant the EU had to follow, effectively dooming the OECD’s negotiation of an MAI. Reflecting this course of events, the OECD issued a press release on December 3, 1998 stating that “Negotiations on the MAI are no longer taking place.”<sup>163</sup>

Negotiations on the MAI have halted at the OECD, although discussions are continuing at a technical level on some of the issues that caused difficulty in the prior negotiations. No agreement has been reached whether the issue of an MAI-type agreement will be discussed as an integral part of the WTO Millennium Round, though it is widely assumed that any future MAI negotiations will take place at the WTO, an IGO with more experience in hosting multilateral negotiations, a larger membership, and no stranger to volatile controversy.

### 5. Lessons from the MAI

Why did the MAI fail at the OECD, and what role did labor rights play in its demise? The MAI failed for three interrelated reasons—the agreement was substantively difficult, offered few benefits, and became a symbolic target despite itself. At the outset, leaving aside concerns of public relations or labor and environmental protection, it is important to realize the political challenge inherent in negotiating the MAI. Despite initial expectations that the MAI amounted to little more than a technical harmonization exercise, the MAI would have proven a difficult agreement to negotiate no matter where it took place—the OECD, WTO or UNCTAD. The MAI negotiation allowed parties to enter reservations and, by the time talks broke down in 1998, over 600 reservations had been entered, ranging from national security, public order, and cultural diversity to exemptions for state and local governments. These would have necessarily been whittled down regardless of the negotiating site, a challenging process by any standard. Moreover, as the negotiations continued parties seemed to move farther apart rather than closer together.

Seeking to avoid deal-breaking disputes, the Negotiating Group decided early on to take the key issue of taxation off the table. The United States and France could not agree on subsidies so they, too, were taken off the table. But even with these major concerns out of play, going into the negotiations the two major power blocs had very different goals in mind. As one observer of the negotiations has noted:

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162. *Id.* at 31.

163. *See id.* at 32.

[The U.S.], which had pressed strongly for the launching of the MAI, wished in particular to make progress in relation to (i) the screening of investments (prior authorisation), (ii) an effective dispute settlement mechanism, and (iii) the imposition of transparency obligations and effective disciplines on exceptions for cultural industries and REIOs [Regional Economic Integration Measures (a regional organization of states that have reduced investment barriers among themselves)]. By contrast, the EC and its members were concerned to limit extraterritoriality.<sup>164</sup>

The lack of agreement on key issues had two important consequences for the negotiations. First, by taking major items off the table, there was little left for horse-trading. In WTO negotiating rounds, while some subjects (such as agriculture in the Uruguay Round) are clearly out of bounds, many other important trade sectors are up for grabs. As a result, giving in one area can be compensated or bartered for advantage in a separate sector. A nation might give on services in exchange for more intellectual property protections. The key measure, at the end of the day, is whether the nation's trading and economic status is strengthened or weakened by the total package. This explains why trade rounds are a take-it-or-leave-it proposition. With the MAI, in contrast, there was little to trade or barter. Negotiated outside a trade round, the MAI provided few chips to exchange, and far fewer once taxation and subsidies were removed from consideration.

As described above, the real prospects for gain were not increased FDI in developed countries but in *developing* countries. There exist few barriers to investment among OECD countries and therefore no pressing need for an MAI within the OECD. This explains the choice of the "build it and they will come" model. For such a model to work, there must be a sense by outsiders that they will miss advantages unless they sign the treaty, even if they did not meaningfully participate in the negotiations.<sup>165</sup> The frenzied campaigns in Sweden and Finland to join the EU

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164. *Id.* at 26.

165. Geoffrey Garrett makes a similar observation in explaining the lack of influence (and acquiescence) of Spain, Portugal, Greece, Italy and Ireland in development of the Single European Act:

Why were France and Germany better able to further their preferences than were the other members of the EC? . . . Following Albert Hirschman's classic argument about asymmetric economic dependence, their bargaining position vis-à-vis the northern states was extremely weak. Put simply, the less developed countries were in greater need of access to the markets and resources of the wealthier EC states.

Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community's Internal Market*, 46 INT'L ORG. 533, 546 n.2 (1992) (citing ALBERT HIRSCHMAN, NATIONAL POWER AND THE STRUCTURE OF FOREIGN TRADE (expanded ed., 1980)).

in 1996 are cases in point. Despite the promising start of eight non-Member countries participating in the negotiations, the level and intensity of opposition to the MAI prevented the early momentum from taking off. Once it became clear that few countries outside the OECD would support the MAI, its potential attraction was greatly lessened. With few substantive areas under discussion and diminishing likelihood of broad developing country accession, the rationale for an MAI became less than compelling.

In retrospect, both the OECD secretariat and the Member country governments clearly underestimated the political sensitivity and implications of an MAI. They thought negotiation of the MAI was a technical exercise, requiring expertise the OECD was uniquely well suited to provide. As a result, the country delegates failed to ask for high-level political support at the outset. The realization that the seemingly technical matters had significant political implications came too late in the game. In retrospect, too, it's clear that the OECD had neither the capacity nor experience to respond to a concerted NGO campaign. The OECD as an institution was not used to being in the public spotlight, and the DAFPE Directorate even less so.

In this regard, the MAI story raises important issues for the role of civil society, and particularly labor and environmental NGOs, in international negotiations. In the coming years, scholars may well look back to the international NGO campaign against the MAI as a turning point in the dash toward globalization. As the European Parliament concluded at the time, the MAI became "a symbol. It crystallises the demands and frustrations of civil society with respect to globalisation."<sup>166</sup> While TUAC might have been willing to stop the pressure once its demands were met, the more active NGOs would not. Some were still convinced that the MAI was a fundamentally flawed treaty. Others, though, were driving home a point about realpolitik—the power of organized civil society to bury liberalization agreements at IGOs.

Perhaps the tale would have turned out differently had CIME actively included other OECD directorates early on. In fact, this was done recently during the development of guidelines for corporate governance and the revision of the OECD Guidelines.<sup>167</sup> Interviews at the OECD made it clear that the institution will be far more sensitive to potential

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166. HENDERSON, *supra* note 23, at 27 (quoting the Lalumière Report, European Parliament, *Rapport intérimaire sur L'Accord Multilatéral sur l'Investissement (AMI)*, Paris, France, Sept. 1998.).

167. See Organisation for Economic Co-operation and Development, *OECD Issues Revised Draft of Its Guidelines for Multinationals for Further Public Comment* (Mar. 15, 2000), at <http://www.oecd.org/media/release/nw00-27a.htm>. See also discussion *infra* text accompanying note 213.

linkages and opportunities for outreach than in the past, engaging in earlier and more frequent consultations with interest groups and civil society.

In the final analysis, it is easy to conclude the OECD simply was the wrong institution to satisfy the demands of negotiating the MAI. But this conclusion is too easy because, despite its shortcomings, the OECD provided real benefits. As described above, TUAC felt that labor issues would have been given even less consideration if the MAI negotiations had taken place at the WTO. From their perspective, the OECD's institutional structure at least gave labor a place at the table, if only to nibble at a small number of courses. The Member countries, too, made a strategic decision in choosing the OECD to host the negotiations rather than larger IGOs. To some extent, the OECD simply provided a convenient institutional shell. But its limited membership, closed-door proceedings, low public profile, and deep technical expertise were viewed as important competitive institutional advantages when negotiations commenced in 1995. By 1998, these virtues had become fatal flaws. As a member of the OECD secretariat who worked closely on the negotiations remarked, in retrospect the MAI story may be viewed as a defining moment when, in the face of a steadily rising tide of globalization, a line was drawn in the sand, and the waters stopped.

#### IV. INSTITUTIONAL ANALYSIS

As the previous examples have demonstrated, the OECD possesses a set of unique and potentially powerful institutional strengths for the promotion of labor rights. But in understanding the organization's strengths and weaknesses in other fields, as well as its potential for future influence, how should one assess the institution itself?

IGOs reduce transaction costs of cooperative agreements and interactions among sovereign states. They do so by creating and disseminating information, establishing rules for activities, and monitoring and facilitating compliance (through both sanctioning and reputational mechanisms).<sup>168</sup> Clearly, however, not all IGOs perform all

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168. The net result is nations' expectation of reciprocal behavior. See Garrett, *supra* note 165, at 534; Krause & Nye, *supra* note 4, at 335; Moravcsik, *supra* note 8, at 197. More formally, Eugene Skolnikoff has divided the activities of IGOs into four broad categories:

1. Provision of information and minor services (including data gathering and analysis, facilitation of interstate consultation, suggestions for coordination).
2. Legislation (creating rules and standards for regulation of activities and allocation of costs and benefits).

of these functions or do so with equal effectiveness. In examining the family of IGOs, or even the subset of United Nations IGOs, one finds redundancy (both intentional and unintentional) among issue areas. As political scientists Lawrence Krause and Joseph Nye have observed:<sup>169</sup>

Different organizations serve different needs. They complement and compete with each other. There is a role in trade for both the GATT and the United Nations Conference on Trade and Development (UNCTAD); in money, for the IMF and the Bank for International Settlements, and Working Party III of the Organization for Economic Cooperation and Development (OECD); in aid, both for the World Bank and regional banks. . . . If we lived in a "first-best" world, this untidy approach to international bureaucracy would be unnecessary. Its appropriateness derives from the large number of constraints that thwart first-best efforts to satisfy the diversity of preferences in the political world we live in.

In a world of IGO overlap, of course, competition inevitably results as IGOs maneuver for the scarce attention and resources of sovereign states. In examining the range of OECD activities, one can find examples that span the functions of IGOs—from creation of information and rule formation to compliance monitoring and facilitation. What, though, are the OECD's relative strengths compared to other IGOs? The answer to this question, and a more revealing analysis of the OECD, lies in focusing on the two distinguishing strengths of the OECD—the creation of communities of influence and conditional agenda-setting.

#### A. Creation of Communities of Influence

In the Introduction to this Article, Anne-Marie Slaughter held out the OECD as a model for future international organizations.<sup>170</sup> The basis for her prediction lies in the growth of transgovernmentalism—cooperative problem-solving by global networks of *subparts* of the state such as courts, agencies, legislatures and executives. "These parts," Slaughter argues, "are networking with their counterparts abroad, creat-

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3. Regulation and adjudication (monitoring adherence to rules, possibly through inspection, mediation, conciliation, and management of specific sanctioning procedures).
  4. Operations (large-scale research and development, operation of a technology or management of resources).

Krause & Nye, *supra* note 4, at 338 (citing Eugene Skolnikoff).

169. Krause & Nye, *supra* note 4, at 336.

170. See *supra* text accompanying note 9.

ing a dense web of relations that constitutes a new, transgovernmental order. . . . [T]ransgovernmentalism is rapidly becoming the most widespread and effective mode of international governance<sup>171</sup>

As recognized by Slaughter, though often overlooked, the OECD exercises enormous influence simply through its organizational activities. The OECD committees regularly bring together governmental officials from the same functional agencies of its Member countries.<sup>172</sup> Beyond guiding and informing the secretariat's activities, these repeated encounters can subtly (and sometimes not so subtly) guide the officials' attitudes and activities, as well. As a classic international relations article observed over 25 years ago:

When the same officials meet recurrently, they sometimes develop a sense of collegiality which may be reinforced by their membership in a common profession, such as economics, physics, or meteorology. Individual officials may even define their roles partly in relation to their transnational reference group rather than in purely national terms. . . . Regularized patterns of policy coordination can therefore create attitudes and relationships that will at least marginally change policy or affect its implementation.<sup>173</sup>

Occasionally, such groups develop into epistemic communities, defined as "a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area."<sup>174</sup> Epistemic communities play a fundamental role in the development and implementation of international law and policy. As Peter Haas has described,<sup>175</sup>

in articulating the cause-and-effect relationships of complex problems, helping states identify their interests, framing the issues for collective debate, proposing scientific policies, and identifying salient points for negotiation . . . [m]embers of transnational epistemic communities can influence state interests either by directly identifying them for decision makers or by illuminating the salient dimensions of an issue from which the decision makers may then deduce their interests. The decision

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171. Slaughter, *supra* note 9, at 184–85.

172. See discussion of the "Rich Man's Club" *supra* Part I.B.1.

173. Keohane & Nye, *supra* note 21, at 45.

174. Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992).

175. *Id.* at 2, 4.

makers in one state may, in turn, influence the interests and behaviors of other states, thereby increasing the likelihood of convergent state behavior and international policy coordination, informed by the causal beliefs and policy preferences of the epistemic community.

Put simply, by providing a forum for government officials and non-governmental experts to meet and share research and experiences on cutting edge policy issues, IGOs can frame the issues for future collective consideration, lay the groundwork for agreement and identify whose the influential voices in the policy debate shall be.<sup>176</sup> An obvious example of an epistemic community relevant today is the Intergovernmental Panel on Climate Change, created by the World Meteorological Organization and the United Nations Environment Program to assess the scientific, technical and socioeconomic information relevant for understanding the risk of climate change.<sup>177</sup> Importantly, many of these groups' members (and others who work closely with the groups in an informal capacity) are not government officials but, rather, experts whose influence is both domestic and *transnational*. Not all groups created by IGOs, of course, achieve such a level of authoritative expertise. At the very least, though, IGOs and their secretariats exercise potentially considerable power in creating influential international elites of like-minded officials and technocrats.<sup>178</sup>

If UNEP and other IGOs such as the ILO and World Health Organization (WHO) also have the capacity to form such communities, what sets the OECD apart? The answer is simple—the scale of its activities. Consider that the OECD's committees, working groups, expert groups and conferences bring together approximately 40,000 government officials and experts annually.<sup>179</sup> Inevitably, some of these gatherings coalesce into a core of identifiable groups of experts that exercise influence over the delineation of policy challenges and strategic analysis of

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176. Krause and Nye argue that “international organizations provide the physical contact and aura of legitimacy that translate some of these potential transgovernmental coalitions into active ones. . . . These coalitions form not only through contacts in the countries but sometimes through an active role by secretariat officials.” Krause & Nye, *supra* note 4, at 337–38. While an epistemic community need not be linked with a specific IGO or necessarily include government officials, this is often the case.

177. For more information, see Intergovernmental Panel on Climate Change, *About IPCC*, at <http://www.ipcc.ch/about/about.htm> (last modified June 27, 2000).

178. This role has long been recognized in international relations scholarship. See Keohane & Nye, *supra* note 21, at 52 (“International secretariats can be viewed both as catalysts and as potential members of coalitions; their distinctive resources tend to be information and an aura of international legitimacy.”).

179. See Organisation for Economic Co-operation and Development, *What is OECD?*, at <http://www.oecd.org/about/general/index.htm> (last modified Sept. 29, 2000)

their resolution.<sup>180</sup> The OECD's strong economic research capacity across a range of governmental activities frees the OECD from the sector-specific constraints faced by UNCTAD, UNEP, and other single-issue organizations. By bringing together the OECD secretariat, national government officials, and nongovernmental experts from different areas, interdisciplinary research becomes a coherent, focused enterprise. Linked with these strengths is the OECD's inherent flexibility. Because its work program is decided by the Member countries, it can transform its organizational dividing lines, procedures, and priorities to conform to changing governmental concerns over complex, multilateral issues that require information creation and dissemination (such as labor standards and trade flows).<sup>181</sup> Simply stating that the OECD's creation of expert networks influences international and domestic policy, however, is insufficient. The key question then becomes whether one can delineate the shape and substance of such influence. And the answer to that lies in understanding the OECD's role as a conditional agenda-setter.

### B. Conditional Agenda-Setter

There is a rich body of political science scholarship examining the role of courts, legislatures, and executive bodies in setting political and legislative agendas.<sup>182</sup> Within this literature, the work on *conditional agenda setting* by scholars examining the European Union is particularly

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180. The influence can be indirect, as well:

As such practices [i.e., patterns of regularized policy coordination] become widespread, transgovernmental elite networks are created, linking officials in various governments to one another by ties of common interest, professional orientation, and personal friendship. Even where attitudes are not fundamentally affected and no major deviations from central policy positions occur, the existence of a sense of collegiality may permit the development of flexible bargaining behavior in which concessions need not be required issue by issue or during each period.

Keohane & Nye, *supra* note 21, at 46. This observation is equally true for nongovernmental officials.

181. Keohane & Nye, *supra* note 21, at 54. Of course, this also means that certain issues are not addressed, or possibly avoided. It is interesting to note, for example, that the ELSA Committee has not considered issues of female and child labor as seriously as at the World Bank, or labor market flexibility as seriously as at the ILO.

182. See, e.g., Randall L. Calvert & Richard F. Fenno, Jr., *Strategy and Sophisticated Voting in the Senate*, 56 J. POLITICS 349, 350 (1994) ("The literature on sophisticated voting has centered around two general questions. First, what is the theoretical relation between sophisticated voting and strategic agenda setting? Second, under what conditions, if any, does sophisticated voting actually take place in legislatures?"); Kevin T. McGuire & Barbara Palmer, *Issues, Agendas, and Decision Making on the Supreme Court*, 90 AM. POL. SCI. REV. 853 (1996) (examining the U.S. Supreme Court's role in agenda setting); D. Roderick Kiewiet & Matthew D. McCubbins, *Presidential Influence on Congressional Appropriations Decisions*, 32 AM. J. POL. SCI. 713, 714 (1988) (examining the influence of veto power on congressional decisions regarding regular annual appropriations legislation).

helpful in understanding the OECD. Much of this work arose as a response to the prevailing international relations literature on power indices. The power index methodology seeks to explain legislative outcomes by examining voting rules for sovereign states. In the context of the EU, political scientists analyze the implications of consensus, qualified majority, and simple majority voting rules in the Council of Ministers.<sup>183</sup> The power index methodology is, in many respects, an approach focused on formal political power and consistent with the traditional view of IGOs as informational clearing houses rather than as governing structures.<sup>184</sup>

Critics of the power index view have charged the methodology was incomplete, ignoring the power of institutions themselves to influence outcomes. Instead of focusing on voting, they argued, one should focus on how the legislative agenda is set *prior* to final votes.<sup>185</sup> An explicitly institutional approach, agenda-setting examines the discretionary power of an IGO to develop the legislation that it wants, “the ability to make proposals that are difficult to amend.”<sup>186</sup> To illustrate these contrasting

183. George Tsebelis & Geoffrey Garrett, *Agenda Setting Power, Power Indices, and Decision Making in the European Union*, 16 INT’L REV. L. & ECON. 345, 347 (1996) (“From the power indices perspective, the ability of a government to influence Council deliberations is a function of the portion of all mathematically possible ‘winning’ qualified majority coalitions to which it is pivotal (i.e., those coalitions that would cease to attain the qualified majority threshold if the government defected).”).

184. Geoffrey Garrett charges that many studies assume “institutions associated with international cooperation have little impact on the political structure of the international system and represent little or no challenge to the sovereignty of nation-states.” Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community’s Internal Market*, 46 INT’L ORG. 533, 535 (1992) (“The common understanding of the role of international institutions is that they monitor the behavior of participants in cooperative agreements and paint ‘scarlet letters’ on transgressors. . . . Thus, no substantive political authority is seen to be delegated to international institutions.”).

185. Their approach, by contrast, “analyzes European decision making in terms of the strategic interactions among the Council, the Commission, and the European Parliament based on the policy preferences of actors in these institutions and on the location of agenda-setting power and veto power under the EU’s various legislative procedures.” Tsebelis and Garrett, *supra* note 183, at 346.

186. See Tsebelis and Garrett, *supra* note 183, at 346. See also Robert Cooter & Josef Drexl, *The Logic of Power in the Emerging European Constitution: Game Theory and the Division of Powers*, 14 INT’L REV. L. & ECON. 307, 313 (1994); George Tsebelis, *The Power of the European Parliament as a Conditional Agenda Setter*, 88 AM. POL. SCI. REV. 128, 131 (1994). Tsebelis argues that:

Agenda-setting players have powers when it is impossible, difficult, or costly for decision makers to modify their proposals. Modification of proposals may be precluded by the prevailing institutions. . . . Agenda setters also have power if the deciding body is impatient, that is, if it pays a price as long as there is no agreement. Impatience creates an asymmetry in favor of the proposal of the agenda setter and against its modifications.

Tsebelis, *supra*, at 131.

analytical methodologies in a U.S. context, a power index analysis would examine floor votes of Senators while an agenda-setting approach would focus on how specific proposals by committees and subcommittees reach the floor for a vote.<sup>187</sup>

Power indices also failed to explain the seemingly unreasonable outcomes when the EU's Council of Ministers would adopt more stringent laws than those in place in any single Member country.<sup>188</sup> In seminal papers by Tsebelis and Garrett, they argued that the explanation lay in the role of the Commission, and particularly that of the European Parliament, in setting the agenda for the Council of Ministers.<sup>189</sup> As a result of the legislative processes created by the Single European Act, these institutions had the power to place items on the legislative agenda that the Council would not otherwise have considered and could amend only with difficulty.<sup>190</sup> There is still lively debate about which EU institution truly sets the Council's legislative agenda,<sup>191</sup> but with a clear

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187. See Tsebelis & Garrett, *supra* note 183, at 358 (“[O]ne cannot analyze qualified majority voting in the Council without knowing how the agenda on which the Council deliberates is set.”).

188. More precisely, they sought to explain why legislation following the Single European Act “often imposes on members states EU standards that are considerably more stringent than the pivotal government under qualified majority voting in the Council would prefer.” Tsebelis & Garrett, *supra* note 183, at 346. The example of auto emissions is a case in point.

189. See Garrett, *supra* note 184; Tsebelis, *supra* note 186; Tsebelis & Garrett, *supra* note 183.

190. Tsebelis, *supra* note 186, at 131 (“It is more difficult for the Council to modify a Parliamentary proposal (provided it is accepted by the Commission) than to accept it.”).

191. Some have argued that the Council effectively sets its own agenda.

Under the Luxembourg compromise that effectively governed decisions making in the EU from at least 1966 until 1986, the Council of Ministers dominated the policy-making process. Although the formal right to propose lay exclusively with the Commission, proposals could only become law if they were supported unanimously in the Council. This effectively gave all the decision-making power to the government with the least interest in changing the status quo [i.e. veto power]. . . . Codecision does grant the Parliament veto power over internal market issues. But it also makes the Council the effective agenda-setter, while limiting the role of the Commission.

Tsebelis & Garrett, *supra* note 183, at 352–53.

Others contend that the Commission is the agenda-setter because the Commission has discretion to introduce legislation rejected by the European Parliament. If this legislation is introduced, the Council “can overrule the rejection by unanimity. . . . A proposal by the Commission is required to initiate the legislative process, and it is the Commission’s proposal that the Council accepts by qualified majority or modifies by unanimity.” Tsebelis, *supra* note 186, at 130. See also Garrett, *supra* note 184, at 550 (arguing that the commission’s “agenda-setting role” gives it “considerable power” because “[i]f the commission asserts that a matter pertains to the internal market, its decision stands unless challenged by a member of the council. If a simple majority of council members agree with the commission, voting is taken by a qualified majority.”).

Yet others place the role of agenda-setter in the Parliament:

acknowledgment of the critically important role played by Parliamentary committees and the EU Commission in determining the contours and shape of the legislation that the Council votes on.<sup>192</sup>

The complex relations among the European Parliament, Commission, and Council, and therefore the EU model of agenda-setting, do not, of course, precisely correspond to the OECD. The key insight of the EU scholarship, however, remains relevant—political institutions exercise considerable power when they can set the agendas of other decision-making institutions. There are degrees, of course, of agenda-setting power. In the case of U.S. Supreme Court nominees, the President is an absolute agenda-setter because the legislative choice is fixed and the Senate may only vote yes or no on the President's nominee. The European Parliament, by contrast, is a *conditional* agenda-setter because its ability to determine the legislative choices by the Council is not absolute.<sup>193</sup> The OECD's role as agenda-setter is significant, as well, but more conditional and indirect than the Parliament's. In IGOs that are less legislative than those in the EU (i.e., most IGOs), agenda-setting takes place in two stages—first through nations' choice of IGOs to lead on issues, and second through IGOs' influence on the agendas of other IGOs.

### 1. IGO Forum Shopping

Forum shopping is an important aspect of litigation in America, as parties seek jurisdictions most favorable to their position, and it is no less important in the international community. As Krause and Nye have observed,<sup>194</sup>

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“The change from consultation to cooperation, and from cooperation to co-decision, decreases the power of the Commission. Its power decreases because it must anticipate objections by two bodies (Council and Parliament) when proposing legislation. The Commission has a smaller range of alternatives from which to frame proposals that will actually become law.”

Cooter & Drexler, *supra* note 186, at 313. See also Peter Moser, *The European Parliament as a Conditional Agenda Setter: What Are the Conditions? A Critique of Tsebelis*, 90 AM. POL. SCI. REV. 834 (1994) (summarizing Tsebelis's argument that “the European Parliament (EP) has an important effect on EU decisions due to its power as a conditional agenda setter” and Tsebelis's “claims that the EP can place items on the legislative agenda which would not otherwise be considered and that such amendments can sometimes result in more integration than would otherwise be chosen.”).

192. See Tsebelis, *supra* note 186, at 139 (concluding that “European integration happens, among other reasons, because national governments have built institutions attributing conditional agenda-setting power to supranational actors”).

193. Tsebelis & Garrett, *supra* note 183, at 354 (noting that under the Cooperation Procedure the Commission must accept the Parliament's proposal before it is presented to the Council, which happens for three out of four amendments).

194. Krause & Nye, *supra* note 4, at 336–37.

Too little attention is paid to the political process by which agendas are set in world politics. The choice of organizational arena often has an important effect on setting the agenda. Moreover, the different jurisdictional scope and the differing composition of delegations to different organizations frequently result in quite different distributions of influence and outcomes. The same issue may come out quite differently in the GATT than in UNCTAD. States try to steer issues to power arenas more favorable to their preferred outcomes.

What does an IGO need to develop a meaningful agreement? It needs a formal structure to hammer out differences, information, and key players at the table. Many IGOs satisfy these three requirements. What provides the OECD's comparative advantage over competing IGOs working on the same issues? The OECD's experience in developing Recommendations and Directives evidences the formal structure to reach agreement. Its formidable technical expertise and research capacity provide the necessary information. And not just any information. The OECD quite deliberately brings an *economic* perspective to policy issues. The other defining feature of the OECD, and its competitive advantage over other IGOs working on the same issues, is its membership. The term "OECD nations" clearly conveys images of wealthy industrialized countries, of a rich man's club, just as UNCTAD denotes images of developing countries with export-based economies. The OECD was chosen in part as the negotiating forum for the MAI because of its in-house expertise, but its members' commitment to economic liberalization was surely significant as well. Negotiations on the MAI commenced at the OECD only after earlier attempts to negotiate an MAI at the broader-based WTO had failed.<sup>195</sup> Similarly, negotiation of the OECD *Guidelines* began at the OECD during the same period in which efforts to develop corporate codes of the conduct at the U.N. became blocked.<sup>196</sup> Continuing negotiation at the OECD ensured not only a greater likelihood of reaching a final agreement, but an agreement that promoted economic liberalism.

## 2. Setting Other IGOs' Agendas

In practical terms, conditional agenda-setting power means that the policy contours change little once they leave the institution. While the choice of forum plays a large role in determining the substantive nature of the work program, a more subtle form of agenda-setting takes place

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195. See discussion *supra* note 115.

196. See discussion *supra* text accompanying note 58.

when an IGO influences the actions of *other* IGOs. The OECD's influence on agenda-setting is least direct in its role as management consultant. But make no mistake: the OECD's vibrant research network acts as an advocacy network. Because the organization's breadth runs deep and because its findings are well respected in the OECD area, its conclusions based on empirical research carry weight. This reputation provides the OECD with credibility in the politics of international economic relations that few, if any, other IGOs have. Ironically, as evidenced by the *Labour Standards Study*, this is particularly the case when it ventures *outside* its traditional domain into social fields. The OECD's research on core labor rights fed directly into the ILO's Declaration on Fundamental Principles and Rights at Work.

The OECD's research capacity is unquestionably strong, and will surely continue to inform policy development whether in-house or at another IGO. But it can potentially prove even more potent when it shades into a legislative function.<sup>197</sup> In a number of instances, the OECD's research has led to agreements among Member countries resulting in soft or hard international law at the OECD *and subsequently at other IGOs*. The study of transfrontier movements in hazardous waste led to OECD decisions culminating in negotiation at the U.N. Environment Program of the Basel Convention.<sup>198</sup> The OECD's recommendations and decisions on bribery led to the UN's Declaration on the same subject.<sup>199</sup> While the MAI was a stand-alone agreement, the European Union (and presumably other members) intended for it to become incorporated into the WTO framework and, but for NGO interventions, would likely have followed the same agenda-setting path as the OECD's work on hazardous waste and bribery. Importantly, these substantive agreements, while not identical, were very similar to their OECD precursors.<sup>200</sup>

This strategy of conditional agenda-setting, though, presents a curious paradox in the context of globalization. The OECD's restricted

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197. While this is a powerful combination, there is a downside to the synergy of research and legislation because the potential exists for the appearance, if not the fact, of biased research to support a predetermined result. While the analogy is imperfect, there is a danger in these instances of the prosecutor acting as jury. It is instructive to note, for example, that the ILO's research institute does not serve a governing body. At the domestic level, as well, the Congressional Budget Office carries more influence than the Office of Management and Budget precisely because of its apparent independence from partisan political influences.

198. See discussion *supra* note 128.

199. See discussion *supra* text accompanying notes 27–33.

200. Interestingly, the limits of the OECD's agenda-setting power have become evident in subsequent Conferences of the Parties to the Basel Convention that have passed amendments much tougher than the OECD's requirements. See HUNTER, SALZMAN, & ZAELEKE, *supra* note 5, at 874–76 (discussing the Basel Ban).

membership makes agreement potentially easier to achieve, at least in principle, since the primary opposition to linkages between liberalization measures and social protections comes from developing countries. Yet, while the OECD's exclusion of developing countries makes such agreements more likely, it would seemingly make them less useful both because the agreements apply only within the OECD area and the OECD lacks the authority among developing countries it enjoys in developed countries.

The "build it and they will come" strategy of negotiation followed in the MAI, Basel Convention, and other examples cited in this article, though, clearly shows that an expanded membership may not be necessary to set the agendas of other IGOs. While the OECD's restricted membership allows it to reach agreements that could not be brokered in more inclusive fora, once such agreements have been completed it can provide the impetus and grounding for development of treaties and conventions at other IGOs. This strategy of reaching agreement at the OECD and then passing the adopted text to IGOs with broader membership is one of foundation-laying, though it can equally be viewed as strategic *preemption*.

Much as a small negotiating committee exercises enormous influence by brokering deals that are then passed to the plenary for further discussion and potential adoption,<sup>201</sup> by brokering an agreement among its members and then offering it to outside parties (either with no chance of amendment, as in the MAI case, or for development of a more comprehensive agreement, as with the Basel Convention) the scope of possible compromises is effectively set. The reason that the agendas coming from the OECD can act as conditional agendas for other IGOs is, at the risk of being redundant, *because they are coming from the OECD*. The organization's membership comprises powerful countries. No one would argue, for example, that UNCTAD acts as a conditional agenda setter. Put simply, when the OECD Member countries arrive at a common position, IGOs take notice. This can be viewed as a form of agenda-setting that results not only from communities of influence (i.e., transnational experts arriving at a common position and extending their influence to other international institutions) but also from sheer numbers. If OECD Member countries can form a common position (even absent a formal agreement), they represent a considerable voting bloc in other IGOs. As Rob Housman has observed:

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201. See, e.g., HUNTER, SALZMAN, & ZAELKE, *supra* note 5, at 299–303 (excerpting Ambassador Tommy Koh's description of how he used a de facto steering committee to drive negotiation of the Earth Summit negotiations).

The OECD is of special importance to trade policy making because of the manner in which it is used by developed countries—the most powerful nations in international trade—to develop common positions to advance through the GATT. The closed-door nature of OECD proceedings, and its at times hostile attitude toward providing greater participation, allows for the development of OECD policies that do not necessarily reflect the views of the citizens of its member nations.<sup>202</sup>

And IGOs take even *more* notice when a transnational group of experts, perhaps even an epistemic community, arrives at a common position, extending the community of influence among powerful countries to other international institutions.

This strategy of conditional agenda-setting, then, relies on the importance of path dependence in fixing the trajectory for future development. There are, of course, limits to such a strategy. The OECD's ability to set agendas is substantially weakened if the Member countries cannot agree amongst themselves, the competing IGOs have the capacity to broker separate agreements, or there exist few incentives for other countries to follow the OECD's lead.

#### CONCLUSION—CHALLENGES FOR THE FUTURE

Consider the changes since the OEEC's founding in 1948. The Cold War has ended. Commerce has become increasingly global. Regional bodies continue to grow, in some cases rivaling the authority of national governments, and a sophisticated, influential, and decentralized universe of nongovernmental bodies exercises considerable influence on national and international policies. The OECD is uniquely well placed to thrive in this new world, but two of its distinguishing features—its restricted membership and lack of transparency—will come under increasing strain as the OECD seeks to meet the challenges of an international economy strikingly different than at the time of its founding almost 40 years ago.<sup>203</sup>

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202. Housman, *supra* note 8, at 744. During my time at the OECD, for example, the Environment Directorate held a special meeting of its Environment Committee to prepare for the U.N. Conference on Environment and Development. While agreement was not reached on a number of issues (particularly the Convention on Biological Diversity), this process developed a number of common policy positions among the Member countries. Housman's observation has been echoed by a member of TUAC who, in reviewing a draft of this Article, noted that "the Trade Committee is basically the industrialised country caucus for the WTO."

203. Basic issues such as this were at the heart of the conflict in 1994 when the United States demanded that Jean-Claude Paye not continue for a third term as Secretary-General of

Important as its research and advocacy roles are, the core identity of the OECD lies in its restricted membership. However, like-mindedness comes at a cost. Within the OECD area, the organization is largely viewed as an authoritative body. This respect for the institution, though, is not universal among developing countries.<sup>204</sup> And in the field of labor rights the major outstanding issues necessarily require developing country involvement. Where are labor rights of concern? Presumably not in OECD countries, at least not core labor rights. Yet the OECD's restricted membership, on its face, presents a significant obstacle to large-scale, inclusive initiatives. One might argue that, notwithstanding its occasional success as a conditional agenda-setter, if the OECD seeks consistently to influence global labor issues, it will need to reconsider its composition. The advent of globalization may create, in fact, an impetus to greatly expand the OECD's membership.

The GATT provides an interesting analogy in this regard. When the GATT was adopted in 1947, its initial and subsequent members were like-minded toward the importance of liberalizing trade and reducing tariffs. If the OECD seeks to further influence labor rights and other global issues, one might contend that it should premise membership on acceptance of market economies rather than the additional, unspoken requirements of wealth or influence. With the expansion of membership since the early 1990s from clearly first world, wealthy countries to emerging economies such as Poland, Hungary and the Czech and Slovak Republics, the preconditions for OECD accession have blurred. If Mexico can join, why not Thailand or Egypt? One might argue that Mexico's trade ties to the United States through NAFTA and the East European countries' potential membership in the EU place them in a special category, but these are hardly compelling rationales.

The OECD certainly has outreach experience in some of its divisions. The Center for Cooperation with Non-Members (CCNM) assists approximately 70 non-Member countries through workshops and peer review exercises, often working with other IGOs such as the ILO, World Bank, and non-Member country ministries.<sup>205</sup> But relations with

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the OECD. See, e.g., Alan Friedman, *Castling a Stronger Role for OECD, With New Priorities*, INT'L HERALD TRIB. (Neuilly-sur-Seine, France), June 6, 1994, available at LEXIS, All Sources, News Library.

204. At a workshop where this paper was presented, for example, an official from Egyptian embassy argued that, in the eyes of developing countries, decisions from the ILO and UNCTAD are more legitimate than those from the OECD. Interview with Mohammad Tawfik, Egyptian Mission to the United Nations, in Geneva, Switzerland (June 25, 1999).

205. In its 2000 work program, for example, CCNM hosted workshops (supported by the ILO and World Bank) with federal and sub-national Russian authorities to publish a review on the labor market and social policies in the Russian Federation. See CENTRE FOR CO-

non-Members are a far cry from the authority and status of membership. Put simply, as the number of OECD nations increases, the meaning of OECD membership may well have to change, as well, yet this places at risk the OECD's comparative advantages as an IGO. Expanding the OECD's membership makes it that much harder to establish a community of like-minded officials and experts. The net result could well be a hindrance to the creation of communities of influence and a weakening of the OECD's conditional agenda-setting power.<sup>206</sup>

While the onset of globalization brings into question the breadth of OECD membership, it clearly *forces* reconsideration of the institution's relations with civil society. While the need for better outreach and organization was certainly evident in the context of labor and the MAI experience, a more recent OECD conference made it starkly clear. This past June, the OECD and Italian government co-sponsored an unremarkable conference in Bologna entitled "Enhancing the Competitiveness of Small and Medium Enterprises in the Global Economy." What *was* remarkable was the 1,500 protesters that needed to be restrained by the police. Like it or not, the OECD and its activities have become a visible symbol of globalization and its discontents.<sup>207</sup>

Following the MAI experience, NGOs have laid claim to a strong voice, if not a place, in international negotiations. This claim has been bolstered by recent actions by other IGOs, under pressure from influen-

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OPERATION WITH NON-MEMBERS, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, CCNM 2000: INTEGRATED PROGRAMME OF ACTIVITIES 69 (2000); Email from Marilyn Yakowitz, Centre for Co-operation with Non-Members, to James Salzman, Associate Professor, Washington College of Law (Sept. 27, 2000) (on file with author).

206. In this regard, it is interesting to note that during the MAI negotiations Mexico would often claim to speak on behalf of developing countries, apparently to the intense irritation of the other Member countries.

207. As a newspaper correspondent reported,

Stefano and Alice came to Via Rizzoli at 1 a.m. with their sleeping bags. At 5 a.m. this morning, they, along with some five hundred youth, tried to push their way through to the Piazza Maggiore, but were restrained by some of the 4,000 policemen. They have come here from Venice to protest against an international conference on "Small and Medium Businesses," organised by the Organisation for Economic Co-operation and Development (OECD) and the Italian authorities.

"We want to protest against globalisation, against the savage capitalism this phenomenon has unleashed. The OECD, the WTO and other international organisations are all at the service of greedy multinationals. We have no more control left on our lives. They decide what we wear, what we eat. This must stop," says Alice, a student of politics at Palermo University.

Vaiju Naravane, *Anti-Globalisation Protests at OECD Summit*, HINDU, June 15, 2000, available at <http://www.indiaserver.com/thehindu/2000/06/15/stories/03150007.htm> (last modified June 14, 2000). See also Bruce Johnston, *Rioters and Police Clash Near OECD Conference*, DAILY TELEGRAPH (London), June 15, 2000, at 19.

tial countries. In July 1998, the Director-General of the WTO announced steps to strengthen discussion and consultations with civil society. This likely was in response to President Clinton's call two months earlier, at the GATT's fiftieth birthday proceedings, for the WTO "to open its doors to the participation of the public" and to similar statements by the European Commission.<sup>208</sup>

What role, then, should NGOs play in influencing multilateral negotiations at the OECD and other IGOs? The revised MAI model ensured NGOs access to most negotiating texts and periodic opportunities to address the negotiators. Some U.N. negotiations have gone even farther, asking NGOs to select one of their members to participate in a non-voting capacity. In this regard, one could imagine a concentric circle approach to treaty negotiations and conferences of the parties, where some NGOs are provided increased access and influence based on certain criteria.

There may be an inherent conflict for the OECD, however, in its efforts to be both transparent to outside groups and a closed-shop discussion forum for members. During the MAI negotiations, for example, the OECD tried to be open about its activities relating to the MAI but refused to release negotiation documents. The reason for this may be obvious—negotiations cannot meaningfully take place behind closed doors if the detailed substance of the negotiations is public knowledge—but it reinforces charges of secrecy. There also remains serious resistance to granting *any* special status to NGOs. As David Henderson, the former Director of the OECD's Economics and Statistics Directorate and close observer of the MAI negotiations, has written:

No non-governmental organisation, whether speaking for business enterprises, trade unions or professional bodies, 'public interest' concerns, or any other groups, has a valid claim in its own right to active participation in proceedings where the responsibility for decisions and outcome rests, and has to rest, with the governments of national sovereign states.<sup>209</sup>

Professor David Robertson states the case more strongly:

[T]he role of NGOs in the MAI story is disturbing. There is a risk that in future other international negotiations, including those in the World Trade Organisation, may be similarly disrupted by these undisciplined and undemocratic groups. . . . For the first time an official initiative to formalise international economic

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208. HENDERSON, *supra* note 23, at 58.

209. HENDERSON, *supra* note 23, at 60.

cooperation was defeated, in part, by a loose coalition of social lobby groups, claiming to speak “for the people.” . . . Ultimately, NGOs stand for “no go!” They aim to block progress in favor of conserving the status quo protecting national culture, domestic values and jobs, traditional farming, trees over people, etc.<sup>210</sup>

Condemning the influence of civil society, however, will hardly make it go away. What might the OECD do to better engage NGOs and preempt concerted hostile campaigns? One option would be to increase the secretariat’s regular briefing contacts with NGOs, as well as TUAC and BIAC, as the Environment Directorate already does. This routine practice of dialogue with NGOs provides warning of potential opposition but also allows the OECD to choose its contacts and potentially involve (and coopt) powerful NGOs as indirect participants rather than committed attackers.

A more formal alternative would be to create additional structured partners to complement TUAC and BIAC, perhaps by creating umbrella partners for environmental, gender, and poverty NGOs. Recall that the OECD maintains two formal links with representatives of civil society. Even if BIAC manages to speak in a manner approaching one voice on behalf of employers, it is still left to TUAC to represent the range of labor stakeholders. This is clearly not sufficient today, if it ever was, because TUAC can only legitimately claim to speak on behalf of unionized labor. NGOs with significant interests in labor rights represent many *other* economic and social actors beyond unionized labor and employers’ groups, not to mention other sectors of civil society, such as environmentalists and human rights groups.

The OECD’s current structure, in fact, provides an incentive for trade unions and BIAC to *oppose* a more formalized status for other NGOs, as their inclusion would weaken the access currently enjoyed by the “official” OECD civil society partners. This is not to suggest that TUAC or BIAC have actively opposed greater inclusion of other civil society groups in OECD proceedings, but a political economy analysis indicates why it would not be in their interests to support

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210. David Robertson, *Foreward* to DAVID HENDERSON, *THE MAI AFFAIR: A STORY AND ITS LESSONS 1–2* (Pelham Paper No. 4, Melbourne Business School, 1999), available at <http://www.cairngroupfarmers.org/ni/reportspapers/mai.htm> (last modified Nov. 17, 1999). See also Brigitte Granville, *Preface* to HENDERSON *supra* note 23, at v (“Mark Twain used to say: ‘All you need in this life is ignorance and confidence, and then success is sure.’ Unfortunately, the MAI affair seems to have proved his point. . . . It was the *bien pensants* who prevailed, the NGOs with their own agenda and without any vision of the overall consequences.”).

changes to the status quo that weakened their relative position as insiders. This phenomenon already appears to be in play at the ILO.<sup>211</sup>

Finally, the OECD can substantively engage civil society, loosely following the practice of notice-and-comment rulemaking under U.S. administrative law. In fact, in a major policy shift following the demise of the MAI, the OECD created a public consultation process. As described earlier, the OECD Guidelines for Multinational Enterprises were recently revised.<sup>212</sup> Using the new process, the OECD posted a draft text on the web and invited public comments. Comments were submitted by businesses, labor unions, environmental groups, academic institutions, individuals, and non-Member countries; these, too, were posted on the web for all to see. A second draft text, influenced by these comments, was posted and subject to a similar round of public comment.<sup>213</sup> CIME also permitted the Chairman of the Review to work with an informal consultation group of TUAC, BIAC and selected NGOs.<sup>214</sup>

Changing the mindset of this exclusive and closed organization will not be easy. Its historically low-profile, technocratic culture seems ill-fitting in the jarring glare of its newly found prominence. Like it or not, the OECD has taken on the mantle of a high-profile IGO in the vanguard of globalization. How the OECD will respond to this unwelcome new identity remains to be seen. Its engagements with nongovernmental actors, though, represent encouraging steps toward greater public accountability. These actions certainly will not satisfy many of those who gathered in Bologna to protest the OECD and all it has come to symbolize, but such movements toward greater

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211. Interview with Mohammed Tawfik, Egyptian Mission to the United Nations, in Geneva, Switzerland (June 25, 1999).

212. See discussion *supra* notes 62–64.

213. See Organisation for Economic Co-operation and Development, *OECD Issues Revised Draft of Its Guidelines for Multinationals for Further Comment*, at <http://www.oecd.org/media/release/nw00-27a.htm> (Mar. 15, 2000). CIME also formally invited the ILO to all Working Party meetings.

214. The Chair of the OECD Working Party on the Review (Marinus Sikkel of the Netherlands) directed an informal process of consultation with TUAC, BIAC, a small number of NGOs and OECD staff known as the Hague Process. Sikkel invited these groups to a first brainstorming meeting in the Hague with the understanding that the participants spoke in a personal capacity. Before each subsequent meeting the group was given a draft of a paper prepared by Sikkel and DAFFE staff (but which had not yet been sent to governments). On the basis of the group's discussions and brainstorming, the draft was then revised and then sent to governments. The last meeting in Amsterdam was expanded to include three members from TUAC, three from BIAC, three NGOs, Sikkel and DAFFE staff, and government representatives from the United States, United Kingdom and Mexico. The Hague Process operated in many respects like a focus group. The members had no mandate to bind their organizations, but their reactions and creative drafting provided insights (and perhaps buy-in) that would not otherwise have been apparent.

transparency will increase the sensitivity of the OECD to significant social issues, further maturing its sense of mission in a world so different from the one its founders envisaged.