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Introduction

The 1995 Organisation for Economic Co-operation and Development (OECD) mandate provided for the negotiation of a multilateral instrument that would set high liberalization and protection standards with respect to international investment.[1] These are by no means new concepts, as a number of institutional arrangements have already dealt with both investment liberalization and protection.

Several bilateral agreements address investment protections between developed and developing countries. Indeed, every major investment exporting country has worked out a network of bilateral investment treaties (BITs) to ensure fair treatment of its investors and investments. For example, France entered into more than fifty BITs. This is a significant number even though France elected not to enter any BIT with developing countries that belongs to the French monetary zone.[2]

Each developed country has prepared its own model BIT over the years. European countries developed these models in the 1970s. The early models focused solely on protection. Expropriation and nationalization were the major threats to international investment in third world countries. A sound investment promotion policy required high standards of international protection against "takings" of property. These "continental" BIT models included such standards, which the failed OECD treaty on the protection of foreign property conveniently provided for "continental" countries.[3]

As the threat of expropriation and nationalization receded in the late 1970s, security considerations yielded to efficiency. Released in 1983, the U.S. model treaty illustrated this shift. While the U.S. model treaty certainly provided high standards of security for U.S. investors and invest-

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1. *See* Organisation for Economic Co-operation and Development (OECD), *Report by the Committee on International Investment and Multinational Enterprises and the Committee on Capital Movements and Invisible Transactions, A Multilateral Agreement on Investment* (1995) <http://www.oecd.org/daf/cmis/mai/mairap95.htm> [hereinafter 1995 OECD Report].

2. *See* Patrick Juillard, *Le réseau francais des Conventions bilatérales d'investissement: á la recherche d'un droit perdu?*, 13 Droit et Pratique du Commerce Int'l 9, 11 (1987); Mahmoad Salem, *Le développernent de la protection conventionnelle des investissements étrangers*, 113 J. du Droit Int'l 579 (1986) (examining various bilateral accords and their effect on the protection of foreign investment); *see generally* Patrick Juillard, *Les conventions bilatérales d'investissement conclues par la France*, 106 J. du Droit Int'l 274 (1979) (discussing the French network of BITs).

3. *See* Patrick Juillard, *L'évolution des sources du droit des investissements*, 250 Recueil des Cours de l'Académie de Droit Int'l 105, 127 (1994).

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ments, it also relaxed government controls over the admission of foreign investment. Consequently, liberalization became a key feature in U.S. BITs, thereby supporting the extension of national treatment to investors and investments.

Investment liberalization, however, had already begun to influence other international instruments. After World War II, several international organizations were formed by and between developed countries to foster economic cooperation and integration. The OECD is the perfect example of an inter-regional organization created by western nations to foster economic cooperation. Economic cooperation among OECD members depends on the elimination of obstacles to the free movement of production factors, including capital.

The 1961 OECD Code of Liberalisation binds all OECD members. At its inception, the Code covered only a limited number of capital movements. The 1984 revision, however, broadened the Code's scope by enlarging the definition of one specific capital movement, foreign direct investment. Consequently, the principle of non-discrimination, embodied in Article 9 of the Code, became applicable to the pre-investment phase. In other words, the Code freed the admission of investments between member States.

The OECD, therefore, played a major role in the formation of international law with respect to investment. The OECD helped develop investment protection concepts, such as those used in BITs, and the 1961 OECD Code paved the way for investment liberalization. Given the OECD's achievements, one queries why the negotiation of the Multilateral Agreement on Investment (MAI),[4] which restates the basic principles of protection and liberalization, should arouse vocal opposition. This Article addresses three issues. Part I explains why OECD is the proper forum for the MAI. Part II discusses investment protection and liberalization. Part III contemplates the prospects for the MAI.

I. OECD, the Proper Forum?

The mandate from the OECD Council called for the negotiation of a free standing multilateral treaty that welcomed all OECD members and provided accession to non-members. The drafters of the MAI intended to create an international treaty within the meaning of the Vienna Convention on the Law of Treaties. The OECD would negotiate and finalize the treaty. Once the OECD enacted the treaty, it would make accession available to non-members. This planned procedure elicited widespread criticism because of the suspicion that developed countries engineered the MAI to force developing countries into a multilateral treaty that did not take into account their views.

4. *See* Directorate for Financial, Fiscal and Enterprise Affairs, Organisation for Economic Co-operation and Development (OECD), *The Multilateral Agreement on Investment: The MAI Negotiating Text* (last modified Dec. 14, 1998) <http://www.oecd.org/daf/cmis/mai.negtext.htm>.

Consequently, developing countries face a hard choice. Either developing countries join the MAI and agree to a number of provisions containing unpalatable terms, such as the principle of national treatment during the pre-investment phase, or they can reject the MAI, which signals to the international community that they may be unwilling to take the necessary steps to attract foreign investment.

Critics suggest removing the negotiation from the OECD and transfering it to a more appropriate forum with a universal character where developed and developing countries may jointly influence the negotiations. One obvious forum, the World Bank, certainly has the expertise through such institutions as I.C.S.I.D.[5] and M.I.G.A.[6] By 1995, however, the World Bank had completed and released the Guidelines on treatment of foreign investment,[7] which only received a mixed welcome. The World Trade Organization (WTO) was another forum option, since one of the multilateral Marrakesh agreements, the WTO T.R.I.M.s, established the link between commerce and investment.[8] Indeed, the EC Commission launched an effort to assert WTO jurisdiction. This effort, however, proved unsuccessful.[9]

The negotiation of the MAI will remain in the OECD. OECD members have already spent a great deal of time and money. To transfer the negotiation to another forum would be wasteful and inefficient. Non-OECD members will likely favor a multilateral agreement that proves an efficient instrument of North-South investment promotion, even though they did not participate in the negotiations. For the same reason of efficiency, developing countries should remain interested in the MAI as OECD continues to host the negotiations.

II. Substantive Issues: North-South, or North-North?

The MAI consists of three different layers. The first is investment protection. The second is investment liberalization. The third is the "new investment disciplines."

The third layer of "new investment disciplines" appears closely related to investment liberalization. Indeed, the 1995 Report on the feasibility of MAI[10] stressed the importance of investment liberalization:

> [the MAI] would go beyond existing commitments to achieve a high standard of liberalization covering both the establishment and post-establish-

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5. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270.

6. *See* Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, 24 I.L.M. 1598.

7. *See* Ibrahim F.I. Shihata, Legal Treatment of Foreign Investment: The World Bank Guidelines (1993).

8. *See* Patrick Juillard, *L'accord sur les mesures concernent l'investissement et lies au commerce*, La Réorganisation mondiale des échanges (Problèmes Juridiques) 113, 128 (1996).

9. *See id.* at 129-30.

10. 1995 OECD Report, *supra* note 1.

> ment phase, with broad obligations on national treatment, standstill, rollback, non-discrimination/MFN, and transparency, and apply disciplines to areas of liberalization not satisfactorily covered by the present O.E.C.D. instruments.[11]

Some argue that problems of investment protection remain limited to North-South problems, such as problems among developed, capital exporting, and developing, capital importing countries. However, the problems of investment liberalization, including the "new investment disciplines," consist largely of North-North problems, problems arising between developed countries.

A. Investment Protection

A number of nations have entered into bilateral treaties for the promotion and protection of investment before the MAI negotiations. Both developed and developing countries entered into these BITs to ensure full protection and security of the investors and investments originating from the developed country and operating in the developing countries.

Development of BITs traces back to the 1970s. During that time, expropriation and nationalization policies created a climate that was inhospitable to North-South investment. This proved detrimental to both the North and the South.

Most developed countries created national guarantee systems so their investors could benefit from an insurance policy protecting against the political risks that could jeopardize their investments in developing countries. Developed countries, however, desired protection before issuing their public guarantee of any given investment in developing countries. Specifically, developed countries wanted to insure jurisdiction of an international tribunal in the event that a developing country expropriated or nationalized an investment in violation of international law. Hence, the first attempts to negotiate international investment agreements between exporting and importing countries took the form of investment guarantees. The investment guarantees generally stipulated that a developed country's guarantee would fall under the jurisdiction of the International Centre for Settlement of Investment (I.C.S.I.D.).[12]

However, investment guarantees did not define in sufficient detail the obligations of the host country vis-à-vis the investors and investments. Thus, the investment guarantees soon yielded to a more elaborate sort of international agreement, the BIT. Developed countries tried to obtain from developing countries detailed commitments with respect to investors and investments. BITs defined the standards and rules governing treatment and the protection of investments. The importance of the BIT is highlighted by the fact that the issuance of a developed country's national guarantee usually depended upon the conclusion of a BIT.

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11. *Id.*
12. Juillard, *supra* note 3, at 112 n.184.

Because of BITs, standards and rules governing investment treatment and protection were elevated to treaty status. Developed and developing countries differed on the origins of these standards. Developed countries claimed that standards such as "fair and equitable treatment," and "full and entire protection and security" were derived from customary international law. Consequently, developed countries argued that the standards bound developing countries even in the absence of a BIT. Developing countries did not adhere to this perspective. Instead, they firmly dissented and argued that principles of customary international law could not bind them.

BITs were slow in gaining international acceptance. Some third world countries were reluctant to enter into BITs. Latin American countries, for example, have long opposed BITs because the mechanism for settlement of disputes between investors and host countries contradicts the Calvo tradition by waiving the contracting Parties' right to exercise diplomatic protection on behalf of their investors. Even the Calvo tradition, however, could not prevent Latin American countries from eventually joining in the BIT movement.

Developing countries' progressive acceptance of BITs suggests that they would not oppose the MAI on the sole basis that the MAI embodies standards and rules. One of the declared aims of the MAI is to "set high standards for the treatment and protection of investment."[13] The U.S. model BIT, however, is supposed to set even higher standards of treatment and protection than most European BIT models. Does this mean that MAI should incorporate the U.S. standards? If it does, it is questionable whether developing countries would accept such heightened standards. Conversely, if the MAI incorporates European standards, the United States would likely reject the MAI in favor of its own network of BITs. The MAI negotiations seek a workable balance.

B. Investment Liberalization

Investment liberalization is the key issue in the MAI negotiations. The United States seeks a multilateral treaty to attain what bilateral treaties cannot achieve -- a worldwide commitment for national treatment in the establishment phase of investment.

A number of developed countries and virtually all developing countries remain reluctant to lift investment controls because greater freedom of investment infringes upon their sovereignty. Absent a treaty, states reserve the power to either admit or deny foreign investment within the limits of their territorial jurisdiction. Furthermore, if states elect to deny any given foreign investment, they incur no liability under international law.

The World Bank Guidelines are consistent with the "encouragement clause" approach. Encouragement is a political rather than a legal commitment to request admission and favorable treatment. Encouragement does not mean that admission is automatically granted with respect to any

13. 1995 OECD Report, *supra* note 1.

request for an investment permit. Guideline 11 (Admission) provides: "Each State maintains the right to make regulations to govern the admission of private foreign investments."[14] Guideline 11 allows each State to deny admission to certain foreign private investments. The World Bank Guidelines further recommend the so-called "restricted list approach," whereby States adopt open admission policies that require screening and licensing. The World Bank Guidelines also retain for the States the right to deny proposed investments that are inconsistent with requirements of national security or that would fall within economic sectors reserved for nationals.[15] As a result of these restrictions and exceptions, the United States opposed World Bank Guideline 11.[16]

The U.S. model BIT opted for an open admission policy. Article II provides:

> 1. Each Party shall endeavor to maintain a favorable environment for investment in its territory by nationals and companies of the other Party, and shall permit such investment to be established and acquired on terms and conditions that accord treatment no less favorable than the treatment it accords in like situations to investments of its own nationals and companies or to nationals and companies of any third country, whichever is more favorable.[17]

National treatment, therefore, extended to the establishment or the acquisition phase of investment. Contracting parties were bound to lift all controls on foreign investment whenever the controls did not apply to domestic investment. Each party nevertheless reserved the right to maintain limited exceptions to the standard of treatment required with respect to the establishment or acquisition phase.

The MAI reflects the U.S. approach on extending national treatment to the establishment or acquisition phase. This position may create problems with developing countries. It has already created problems with some developed countries. An overly broad definition of investments covered by the MAI combined with the inclusion of national treatment during both the establishment and the post-establishment phases might impose new international commitments upon industries that are inconsistent with prior treaties or domestic legislation. The French protest over "cultural industries" reflects this concern.

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14. SHIHATA, *supra* note 7, § 3.

15. *Id.* at 157.

> Without prejudice to the approach of free admission recommended in Section 3 above, a State may, as an exception, refuse admission to a proposed investment:
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> (a) which is, in the considered opinion of the State, inconsistent with clearly defined requirements of national security; or
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> (b) which belongs to sectors reserved by the law of the State to its nationals on account of the State's economic development objectives or the strict exigencies of its national interest.

16. *See id.* at 132.

17. TREATY AFFAIRS OFFICE, U.S. DEP'T OF STATE, UNITED STATES: 1994 MODEL BILATERAL INVESTMENT TREATY art. II (1994).

The Bern Convention, which governs intellectual property rights, embodies the basic principle of national treatment. This principle is subject to some limitations. For example, strict application of national treatment requires the law of the country seeking protection to define the period of protection. The Bern Convention, however, provides that the law of the country of origin defines the period of protection if that period is shorter than the period of the country seeking protection. Consequently, the French Cour de Cassation held in 1975 that, even though the French period of protection had not dissipated, the works of Buster Keaton were not entitled to protection in France because the period of protection had ended in the United States, the country of origin. Under MAI rules, strict application of the principle of national treatment would require a different result; the works of Buster Keaton would receive protection in France as long as the period of protection lasts in France.

French law distinguishes between "moral rights" and "pecuniary rights" with respect to intellectual property. French authors' guilds have voiced concern that the MAI will deprive French authors of their moral rights, the "droit moral de l'auteur sur son oeuvre." Under the provisions of the MAI, the "droit moral" might be an unreasonable impairment of the investor's right to full exploitation of the work. In 1991, the French Cour de Cassation held that the author of a motion picture could validly invoke his "droit moral" to enjoin the distributor from releasing a colorized version of that motion picture in France because colorization was an infringement upon the "droit moral" of that author. Commentators have pointed out that the MAI might have changed the outcome of this case.

Additionally, the MAI's definition of the word "investment" is overly broad. Not all foreign assets constitute foreign investment, and not all foreign assets are worth the kind of treatment and protection that foreign investment deserves. Consequently, the scope of the MAI needs further consideration.

C. Prospects for the MAI?

Interest groups have opposed the MAI and argued that it grants multinational enterprises unfettered power to destroy the environment. It is not clear whether the political will of the OECD will remain strong enough to overcome opposition from interest groups.

Help may come from other sectors. No international organization has attempted to regulate the activities of transnational corporations after the U.N. efforts failed. The only significant achievement in this field is the 1976 OECD Guidelines for multinational enterprises. Although the Guidelines proved to be a useful instrument, it is, nevertheless, non-binding and limited in scope to the OECD. In short, the international economic order must construct its own checks and balances.

The OECD members have agreed to annex the Guidelines to the MAI. An annex to an existing treaty has the same force and value as the treaty itself, unless otherwise provided by the treaty. In other words, absent a provision to the contrary, the annexes will be subject to the rule of "pacta sunt servanda." However, the Annex of the MAI that embodies the Guidelines will not share the binding character of the MAI. The consolidated text provides that annexing the Guidelines to the MAI will not change their non-binding character. The purpose of annexing the Guidelines is to invite the parties to actively cooperate and participate in the interpretation, application, and implementation of the Guidelines, not to bind the parties.

BITs define the host country's obligations to foreign investors and foreign investments. BITs, therefore, create rights for multinational enterprises. This is one of the reasons why BITs have been considered an unbalanced instrument; a balanced instrument would define both the rights and the duties of the multinational enterprise. The MAI is not unlike BITs in that respect. The MAI defines the obligations of the parties in terms of investment protection and investment liberalization. Annexation of the Guidelines, however, adds something new to the MAI and makes it a different instrument.

The Guidelines provide a number of policy objectives for multinational enterprises, including a section on creating employment opportunities and fostering industrial relations. That section provides that multinational enterprises should respect the right of their employees to organize unions and to engage in collective bargaining through unions. The reference to the Guidelines in the MAI explains labor unions' potential endorsement of the MAI. The 1995 OECD Report states, "the business community and labour, represented by the Business and Industry Advisory Committee (B.I.A.C.) and the Trade Union Advisory Committee (T.U.A.C.) to the OECD, strongly support a MAI which sets high standards and a balanced and equitable framework for dealing with investment issues."[18] If the MAI enjoys labor support at the close of the negotiation, one can optimistically assume that it will successfully go into force. Should labor support fade away, however, the prospects for the MAI would not look so bright.

18. 1995 OECD Report, *supra* note 1.