LINKAGES IN INTERNATIONAL INVESTMENT REGULATION: THE ANTINOMIES OF THE DRAFT MULTILATERAL AGREEMENT ON INVESTMENT

Published in (1998) ***University of Pennsylvania Journal of International Economic Law*** **19(3) 731-768**

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INTRODUCTION

The theme of this Special Issue, linkages as a phenomenon in international economic law, involves some technical legal questions of considerable interest, as well as addressing some fundamental issues in contemporary global governance. This paper[1] begins by sketching out the broader context which I argue the theme subsumes, which is the growth of regulatory networks for the governance of new forms of globalization of the world economy. Next, it explores the ways in which international liberalization processes tend to generate linkages with related regulatory regimes, and argues that the construction and management of these linkages is a major feature of the processes of reconstruction of the global political economy.

The main part of the paper focuses on the proposed Multilateral Agreement on Investment (MAI), negotiations for which were formally initiated in 1995 by the OECD Council of Ministers, but had still failed to produce a final draft by May 1998. A multilateral instrument dealing with international investment would clearly fill a large gap in the network of regulatory measures governing the world economy.[2] By the same token, it would inevitably cut across a

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[1] This paper was first presented at the December 1997 meeting of the International Economic Law group of the American Society of International Law, on *Linkages as a Phenomenon: An Interdisciplinary Approach*. I would like to thank those who helped organise the meeting and facilitate my participation.

[2] As is well-known, investment regulation was the missing element of the postwar organizational design, see e.g. J. M. Kline, *International regulation of transnational business: providing the missing leg of global investment standards*, **2**(1) TRANSNATIONAL CORPORATIONS, 153-64 (1993); S. K. B. Asante, *International Law and Investments*, in INTERNATIONAL LAW - ACHIEVEMENTS AND PROSPECTS (M. Bedjaoui ed., 1991) pp. 667-690. This resulted partly from the failure of the great powers to agree on the proposed Havana Charter for an International Trade Organization of 1948, which covered not only trade but international business activity more generally. It included powers to make recommendations and promote agreements "to facilitate an equitable distribution of skills, arts, technology, materials and equipment", to "assure just and equitable treatment for the enterprise, skills, capital, arts and technology brought from one Member country to another", and to "avoid international double taxation". Most notably, it included a chapter on restrictive business practices, including an international complaints and investigation procedure: see United Nations Conference on Trade and Employment, Final Act and Related Documents, U.N. Sales No. 1948.II.D.4.1; the relevant articles are excerpted in UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. INTERNATIONAL INVESTMENT INSTRUMENTS: A COMPENDIUM (1996) vol. 1 p.3-13. The prescience of the drafters of the Havana Charter is

number of existing related regimes. The issue of linkage between related international regulatory arrangements was brought to the fore especially by the Uruguay Round and the broadening of the scope of the trade regime with the establishment of the World Trade Organization (WTO). The WTO agreements already overlap significantly into the arena of investment, and the Singapore Ministerial Meeting in December 1996 established Working Groups on both trade and investment and trade and competition policy to explore this interaction further.[3] Yet, that decision also recognized that a number of other bodies, notably UNCTAD,[4] are also concerned with this topic. Thus, the OECD negotiations and the draft MAI, whatever their final outcome, raise some interesting questions both about the political processes which appear to be producing these complex, inter-linked arrangements, as well as about the legal means that can be used to manage and perhaps harmonize these inter-relationships.

MANAGING GLOBAL GOVERNANCE NETWORKS

A central feature of the recent phase of "globalization" has been the growth of international regulatory networks. Increased economic integration and interdependence has exposed the limitations of the classic liberal internationalist system, based on national sovereignty within a loose framework of inter-state rules, agreements and organizations. Consequently, both within and between states there has been a shift from "government" to "governance" based on "regulation", in which state functions are delegated to specific public bodies, operating within rule-based bureaucracies and applying specialized professional or scientific techniques. Thus, although national states remain the primary focus for political legitimation, their policies are increasingly formulated and implemented through decentralized layers of regulation, internationally coordinated through complex networks.[5] Thus, the new forms of management

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especially notable since the future trajectory of international investment, especially the dominance of foreign direct investment (FDI) and flowering of the Transnational Corporation (TNC) were hardly foreseeable at that time.

[3] During the Uruguay Round, pressures to broaden the negotiating agenda to include investment policy were resisted, especially by developing countries, but several agreements in the WTO package overlap significantly with investment, notably the agreements on Trade Related Investment Measures (TRIMs), and on Trade Related Intellectual Property Rights (TRIPs), and the General Agreement on Trade in Services (GATS), which adopted a very broad definition of international provision of services including delivery through a foreign establishment: see Pierre Sauvé, *Qs and As on Trade, Investment and the WTO*, J. W. T. 55 (1997). The report of Working Group on the relation between trade and investment, which is expected by the end of 1998, should appear just as the OECD negotiators make a final attempt to save the MAI.

[4] Since the reorganisation of the UN Center on Transnational Corporations as the Transnational Corporations Management Division of ECOSOC in 1992, UNCTAD has taken over some of its activities and staff, and has produced the annual World Investment Report since 1991. The May 1996 Midrand UNCTAD IX Conference mandated UNCTAD's Commission on Investment, Technology, and Related Financial Issues to pursue work related to a possible multilateral framework on investment (MFI). It has interpreted its role primarily as that of helping developing countries to participate effectively in international rulemaking and ensuring that the development dimension is adequately addressed. UNCTAD's 1996 WORLD INVESTMENT REPORT focused on the interlinkages between trade and investment, and included a Part Three entitled *Towards a multilateral agreement on foreign direct investment?*

[5] See Sol Picciotto, *Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism*, **17**(2/3) NW. J. INT'L. LAW & BUS. 1014.

of the interdependent world economy occur through a " web of formal and informal intergovernmental regulatory relationships ... that simultaneously empowers and constrains governments", and "an intricate network of vertical and horizontal links between all levels of government" attempting to coordinate "regulatory systems [that are] growing progressively more complex and multi-layered".[6]

Some take a positive view of this process of disaggregation of state functions and their interlinkage through mainly informal and flexible international arrangements. Anne-Marie Slaughter has argued that it constitutes a "transgovernmentalism", which can preserve and strengthen the state, while creating " a genuinely new world order in which networks of institutions perform the functions of a world government - legislation, administration, and adjudication - without the form".[7] Slaughter is undoubtedly correct to stress that the national state is still the primary arena for legitimation and enforcement of societal norms. Nevertheless, the increasingly dense and complex international institutional networks created by pressures towards globalization raise many questions about both the effectiveness and accountability of arrangements for global governance.

The functional fragmentation of international regulatory networks creates both an enforcement gap and a democracy deficit. The establishment of internationally-agreed standards, and arrangements for the coordination of their application or enforcement, tends to take place through select and informal groups of specialists, frequently operating within a strong professional ideology. These often ignore or by-pass the state-based framework of intergovernmental organizations. The activities of specialized global "issue networks" may be underpinned by strong and shared professional ideologies,[8] but they lack the broader legitimacy provided by national social and political structures. If a "global civil society" can be said to be even incipient, as argued by some,[9] it certainly lacks an adequate institutional basis. Instead, issue networks are formed ad hoc, and attach themselves opportunistically to more formal organizations as necessary, for the purposes of resourcing or legitimizing their activities. These broader-based and more formal organizations may be used to provide some legitimation for internationally-agreed standards, due to their higher public profile. They may also help with the enforcement gap, by creating linkages with other issues which might secure their widespread implementation.[10]

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[6] Scott H. Jacobs, *Regulatory co-operation for an interdependent world: issues for government, in* REGULATORY CO-OPERATION FOR AN INTERDEPENDENT WORLD (Scott H. Jacobs, ed.) 15, 17 (1994) [emphasis in the original].

[7]. Anne-Marie Slaughter, *The Real New World Order* **76**(5) FOREIGN AFF. 183, 195 (1997).

[8]. Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination,* 46(1) INT'L. ORG. 1 (Special Issue on Knowledge, Power and International Policy Coordination).

[9] Ronnie D. Lipschutz, *Reconstructing World Politics: The Emergence of Global Civil Society,* **21** MILLENIUM 389 (1992).

[10] Thus, for example, the work on setting and enforcing of standards for the global banking system by bodies such as the Basle Committee on Banking Supervision, and the Financial Action Task Force, has intersected with, and in many ways depended on, more formal organizations such as the BIS, OECD, IMF, IBRD and G7. The work of the Basle Committee has become much more high-profile in the past decade or so, given impetus by the perceived need to respond to dramatic crises such as BCCI and Barings. Significantly, however, the

However, in many ways these bodies provide just a convenient institutional shell. The choice of one organization rather than another is influenced not only by the appropriateness of its concerns or formal competence, but often more by its membership and the effects of that on the nature and quality of outcomes from negotiations. Thus, a central feature of global governance in the current period is the strategic manoeuvering through the maze of arenas, and formation of linkages between a wide range of regulatory arrangements and more formal organizations. It is through this process that world markets are being restructured, and new institutional frameworks are being devised for international trade and investment. From this perspective, the issue of linkages involves not only technical legal questions of considerable interest and some complexity, but also wider social, economic, and political considerations.

LIBERALIZATION AND THE SHIFT FROM NEGATIVE TO POSITIVE INTEGRATION

More broadly, the process of functional fragmentation and regulatory networking results from the weakness of the classic liberal international system, re-established in the postwar settlement in the form of an "embedded liberalism".[11] This restored the nationally-based systems of economic management on which social and political consensus depended, but within a framework of international arrangements geared towards progressive liberalization under the aegis of the IMF and the GATT. The encouragement towards progressive relaxation of tariffs and exchange controls, and the resultant increase in cross-border trade and investment, gradually undermined the nationally-based systems of economic management and democratic legitimation. However, liberalization by the removal of barriers to markets has also led to pressures to underpin increasingly integrated global markets with adequate, internationally coordinated regulatory arrangements.

For money and finance, the introduction of partial currency convertibility after 1958 combined with nationally-oriented monetary policies of the major powers fostered the growth of offshore financial markets, which in turn sank the fixed-rate IMF regime. The pressures of global finance have gradually overwhelmed national institutional and regulatory frameworks, as the rapid growth of new forms of financial intermediation have undermined structural barriers and led to the introduction of competition into national financial markets. Thus, current account convertibility undermined the fixed exchange-rate system; currency floating led to full convertibility; and since the mid-1980s there has been a gradual relaxation of restrictions, both on the ability of residents to borrow from foreign capital markets, and conversely the right of foreign borrowers to tap domestic markets or of domestic savings to be invested abroad. However, the consequent rapid growth in short-term international capital flows has also led to the threat of volatility, which has been blamed for the Mexican crisis of 1994 and the Asian crisis of 1997-8, the repercussions of which are still continuing. This has led to calls by authoritative figures such as Joseph Stiglitz, chief economist of the World Bank, for the

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Core Principles for Banking, which it produced in 1997 as a distillation of its work to establish minimum prudential standards for supervision of financial institutions,were presented to the Annual Meeting of the IMF/IBRD in Hong Kong in 1997 for endorsement and wider promulgation, and proposals for "improving the architecture of the global financial system" presented to the G7 in Birmingham in 1998 envisage an enhanced role for the IMF and IBRD.

[11] John G. Ruggie, *International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379 (1982).

regulation of short-term capital flows.[12] Indeed, since the mid-1970s the liberalization of capital markets and the opening up to greater competition of relatively closed channels of financial intermediation has led to a movement towards formalized regulation, loosely coordinated internationally through bodies such as the Basle Committee on Banking Supervision. Thus, although liberalization has required de-regulation, through the removal of border controls and structural barriers to market access, it has also involved re-regulation, through the introduction of formalized prudential requirements for intermediaries, and conduct of business rules.

In parallel with this, trade liberalization has also involved the removal of border barriers, bringing into sharper focus the trade-restrictive effects of variations between national regulations, and hence the issue of international coordination of regulatory arrangements and the role of international standards. Thus, the success of GATT negotiating rounds in reducing tariffs on manufactured goods shifted attention to the so-called non-tariff barriers, or the effects on trade of regulatory differences. Here, the pressures to open markets brought into question national regulation of many areas of social and environmental concern, requiring GATT to evaluate the balance between the free trade imperatives of its non-discrimination rules and the various exemptions for national policies in article XX. GATT codes, initiated in the Tokyo Round, and formalized as WTO Agreements, especially the agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS), establish criteria for the evaluation of whether national regulation is unnecessarily trade-restrictive, generally creating a presumption of validity for national rules which implement internationally-agreed standards. Perhaps unsurprisingly GATT panels generally tended to come down in favour of free trade, as seen in reports such as *Thai Cigarettes*[13] and the *Tuna-Dolphin* cases[14].

Thus, the main impetus in the phase of globalization that gathered momentum during the 1980s was liberalization, initially seen as requiring the removal or reduction of national barriers to the flows of commodities and capital. Although this was often referred to as involving deregulation, this has widely been recognised as a misnomer.[15] The opening up of markets to increased competition certainly involved the ending of direct state intervention, whether by ownership, structural controls, or informal support of cartels and entry restrictions. At the same time, however, there has been a growth of regulation, much of it originating in or being transmitted from international or supranational arenas or bodies. Indeed, it can be seen that

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[12] Joseph Stiglitz, *Boats, Planes and Capital Flows*, Personal View, FINANCIAL TIMES, March 25, 1998, at 32; *The Role of International Financial Institutions in the Current Global Economy*, Address to the Chicago Council on Foreign Relations, February 27 1998, Chicago. http://www.worldbank.org/html/extdr/extme/jssp022798.htm. A contrary view was expressed by Lawrence Summers, Deputy US Treasury Secretary, in *Go With the Flow*, Financial Times, 11 March 1998.

[13] *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, Unadopted Panel Report of 7 November 1990, DS10/R - 37S/200, LEXIS, GTTWTO file, GATTPD 6 (1990).

[14] *US - Restrictions on Imports of Tuna* (complaint by Mexico), unadopted Panel Report of 3rd Sept. 1991, DS21/R - 39S/155, LEXIS, GTTWTO file, GATTPD 1 (1991); *US - Restrictions on Imports of Tuna* (complaint by EEC), unadopted Panel report of 16 June 1994, DS29/R, LEXIS, GTTWTO file, GATTPD 11 (1994).

[15] See e.g. GIANDOMENICO MAJONE, DEREGULATION OR RE-REGULATION. REGULATORY REFORM IN EUROPE AND THE UNITED STATES (1990); Scott H. Jacobs, *Regulatory co-operation* (1994), op. cit. n.4 above.

the shift towards more open and competitive markets in many ways requires a formalization of regulation or a shift to juridification to provide transparency on which equal access to market depends. Thus, for example, the opening up of capital markets has entailed a shift from informal oversight by central banks or finance ministries of private or privileged dealings between closed groups of banks and brokers, towards a high degree of formal regulation, ranging from capital requirements for financial institutions, to rules controlling access to and abuse of privileged information (e.g. Chinese walls , insider dealing).

Hence, the process of restructuring of the framework of global economic activity has involved a tension between liberalization (the removal of national barriers to trans-border flows) and international re-regulation (the formulation of substantive standards and rules governing global economic activity and the establishment of arrangements for their coordinated enforcement). The dominance of pressures for liberalization has created a strong presumption, at least among neo-liberal ideologues, that regulation is an unnecessary burden, and generally results from self-interest or protectionist motives. From this perspective, international integration means the creation of open markets, which requires only strong provisions for the protection of property rights, the maintenance of public order, and not much else. Certainly, at the international level regulatory standards have proved hard to agree, which helps to explain the trend towards functional fragmentation (discussed above), the preference for soft law, and in particular the problem of inadequate coverage of, and consequent loopholes in, the global regulatory networks. The establishment of international standards generally requires a political impetus, which has occured in relation to finance as a result of dramatic bank losses and failures (from Herstatt Bank, through Banco Ambosiano and BCCI, to Barings and Daiwa) or economic crises such as the Mexican and Asian episodes. In one way or another, moves towards more comprehensive regional or global liberalization generate a process of re-regulation, both by bringing into question existing national provisions, and by generating linkages with the international arrangements within which many regulatory regimes are now embedded, or indeed from which they have originated.

From this perspective, the issue of linkages is not a peripheral technical question, but a central one in the current phase of restructuring of the global political economy. It should be seen as extending beyond ensuring passive accommodation or lack of direct conflicts between related regulatory regimes. What is increasingly called for is the creation of positive linkages across regulatory regimes, to facilitate a shift from negative to positive integration.[16] In some respects the Marrakech Agreement has pioneered a new approach, by creating conditionality linkages between the GATT market-access regime and parallel international standard-setting arrangements. However, only in the TRIPs agreement are these of a positive type, i.e. requiring all WTO members to accept and enforce a minimum level of intellectual property protection. In relation to technical and health standards, the TBT and SPS agreements create negative linkages, which invalidate national regulations unless they can be justified by reference to international standards or scientific principles. Hence, they subjugate regulatory standards to the imperatives of trade, rather than vice versa. Most importantly, these arrangements have

[16] See Les Metcalfe, *The weakest links: building organizational networks for multi-level regulation,* in Scott H. Jacobs, REGULATORY CO-OPERATION, (1994) op. cit. supra n.4, 49.

only hesitantly begun to take account of regulation governing the social conditions of production and consumption of goods.[17]

The following discussion of the MAI will analyse the ways in which an investment liberalization regime would create overlaps and linkages with regulatory arrangements, and the methods of managing those interactions. It will also seek to explore how such linkages might be structured in a positive way, to enhance compliance with and effectiveness of international standard-setting arrangements. It argues that, as at present drafted, the MAI is inadequate, in emphasising liberalization, and neglecting the problems of interaction even where these are readily apparent. More broadly, it argues that an international framework for investment needs a more adequate underpinning involving positive linkages to regulatory regimes establishing standards, so that investors' rights are seen to be balanced by their acceptance of responsibilities.

THE MAI: SIGNIFICANT STEP OR FALSE START?

The Political and Economic Background

In April 1998 the MAI negotiations were formally suspended for six months for "a period of assessment and further consultation between the negotiating parties and with interested parts of their societies".[18] Since they were originally scheduled to take only two years from May 1995, and were extended to April 1998, this further setback indicates that the proposal raises both complex technical issues and important questions of global economic governance, which merit more extensive and wide-ranging debate. Indeed, a major reason for the stalling of the negotiations has been their exclusionary character. The negotiations were entrusted to a "high-level group" based at the OECD, but operating outside the OECD committee structure. The negotiators have been officials from the OECD members states,[19] although non-OECD

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[17] In the first Tuna-Dolphin case, the GATT panel took the view that the US measures to protect dolphin by regulating tuna fishing methods "could not possibly affect tuna as a product" *US - Restrictions on Imports of Tuna*, loc. cit. n.14 above (1991), para. 5.14. Technical regulations are defined in the TBT as those laying down product characteristics "or their related processes and production methods" (TBT, Annex, para. 1). The SPS also includes "processes and production methods", but defines the measures covered in terms of the risks from pests, additives or contaminants, and diseases carried by animals, plants, or pests.

[18] Para. 3, *Ministerial Statement on the MAI*, OECD Council Meeting, 28th April 1998, OECD News Release 29. It became clear in February 1998 that the agreement could not be finalised in time for the annual OECD Ministerial Meeting, when the US informed the other negotiating parties at a high-level meeting of the US Administration's view that it did not consider an acceptable agreement could be ready by that date: see statement of Alan Larson, Assistant Secretary of Economic, Business and Agricultural Affairs, before the Subcommittee on International Economic Policy and Trade of the House International Relations Committee, reprinted in U.S. Department of State Dispatch, April 1998, 30, 33. During the Ministerial meeting, however, last-minute objections from others, especially the French government, necessitated a late amendment adding paragraph 3 to the draft Statement, which undoubtedly reflected the gathering strength of political opposition to the agreement.

[19] The proposal for a Wider Investment Instrument originated with the OECD Committee on International Investment and Multilateral Enterprise (CIIME) and Committee on Capital Movements and Invisible Transactions (CMIT), which carried out some 70 preparatory studies between 1991-1995. However, once the OECD Council of Ministers agreed to begin negotiations, in May 1995, a high-level Negotiating Group was established, which has worked outside the OECD committee structure. The aim was to speed the negotiations, but the result has been that the bargaining has been between national positions and has focussed on the extent of the commitments to liberalize. The implications of liberalization for specific regulatory regimes (e.g.

members have been consulted.[20] Nevertheless, the intention has been to create a "free-standing" agreement, to which non-OECD members could accede, on a negotiated basis.[21] Whether or not an agreement is signed, or succeeds in obtaining the requisite ratifications,[22] the experience of negotiating the text will undoubtedly be carried over into later negotiations, whether at the WTO, UNCTAD, or elsewhere.[23] Nevertheless, the choice of the OECD as the forum, and of investment liberalization and protection as the agenda, was a tactical move which may be considered to have hindered rather than assisted the evolution of the broader international framework for investment that undoubtedly is needed.

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taxation, environmental protection, competition policy) have consequently been treated as secondary. The bureau of the Negotiating Group has consisted of Frans Engering (Netherlands) Chairperson, and Al Larson (US) and A. Saiki (Japan) Vice-Chairpersons. Mr Engering resigned as Chairperson with effect from the May 1998 Ministerial. In addition to OECD members, the European Community has been a negotiating party, represented by both the Commission and the Presidency, working to guidelines agreed by an Ad Hoc group of the member states. Although the EU member states have been as divided both on the extent of the overall commitment to liberalization and on specific key issues as the MAI negotiating parties as a whole, in the final analysis the negotiation is one mainly between the EU, the USA (cum-NAFTA) and Japan. However, the EU negotiators need to satisfy at least the key EU member states if the final package is to be acceptable.

[20] It should be noted that the 24 long-standing OECD member countries have been augmented by the addition of Mexico in 1994, the Czech Republic in 1995, and Hungary, Korea and Poland in 1996. To attempt to compensate for the exclusion of non-OECD states from the negotiations, there has been a programme of "outreach" by holding meetings around the world, to keep key decision-makers informed. A number of states have been granted observer status (Argentina, Brazil, Chile, Hong-Kong-China, and Slovakia; Estonia, Latvia and Lithuania were added more recently), and it has frequently been said that others have asked for the same status.

[21] The MAI Text provides for accession by "any state, regional economic integration organization, and any separate customs territory which possesses full autonomy in the conduct of matters covered by this agreement". However, this depends on the approval of the MAI Parties acting through the Parties Group of the obligations undertaken by such an acceding state, which essentially means acceptance of the country-specific exceptions which it wishes to declare, which would become subject to "standstill", and potentially "rollback": see further below. The OECD negotiating parties have begun discussions on how to treat accession negotiations especially in relation to developing countries, e.g. criteria for acceptable exceptions, possibility and length of transition periods, etc.

[22] If an agreement is reached and approved by the OECD Ministerial Council in May 1998, the intention is that signatories should try to ensure ratification within a reasonable period, probably 18 months. However, it would not enter into force unless the signatories agree that a "critical mass" of ratifications have been obtained, although the mechanism by which this will be decided is not yet settled. The key state here is clearly the USA; although EU states have been willing to go ahead on other similar treaties without US participation (the Energy Charter Treaty, the OECD Shipbuilding Agreement, and the GATS-Financial Services Agreement) they would be unlikely to do so in the case of the MAI.

[23] Some have argued that the WTO would be the appropriate forum, especially from the point of view of developing countries, being more inclusive than the OECD (A. V. Ganesan, *Strategic Options Available to Developing Countries with regard to a Multilateral Agreement on Investment,* UNCTAD Discussion paper no. 134, UNCTAD/OSG/DP/134, April 1998). It should be remembered, however, that major countries and important recipients of investment such as China and Russia are still not members of the WTO. The issue seems sufficiently important that a mandate could be sought from the UN General Assembly for a specific negotiation.

The MAI aims to establish a comprehensive framework for the liberalization, as well as protection, of all types of international investment. The MAI proposals [24] follow a long history of attempts to establish a comprehensive legal framework for the protection of foreign investment, dating back at least to the 1920s,[25] and in particular the extensive experience in the past three decades of negotiation of bilateral investment treaties (BITs).[26] However, the MAI aimed to be broader in scope than earlier treaties, and to establish a high-standard agreement, building on existing instruments by taking their highest-common-factor rather than lowest-common-denominator. The evident intention was to take advantage of the generally more open and welcoming climate towards foreign investment since the mid-1980s to establish a high legally-binding benchmark for the protection and liberalization of all types of cross-border business.[27] This ambitious scope, as well as the new and changing global economic and political conditions in which it has been developed, raise far broader issues than the traditional concerns, which focused on post-entry fair treatment, especially compensation for expropriation.

Although in some respects the process of economic globalization has gathered further momentum in the 1990s, even as the MAI negotiations have progressed, it has also become more problematic, and has certainly aroused more political opposition. Flows of foreign direct investment (FDI) resumed their rapid growth in 1995 after a slowdown in the early 1990s.[28]

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[24] The MAI Negotiating Text and Commentary was first published unofficially on the Internet in spring 1997, at about the time that it had originally been intended to sign the agreement, in a leaked version obtained by an NGO. It was then officially released in a version of 1st October 1997, *Multilateral Agreement on Investment. Consolidated Text and Commentary*, DAFFE/MAI/NM(97)2. The text, without the Commentary, was subsequently made available on the OECD website (http://www.oecd.org), the latest version available for this article being that of 24th April 1998. In addition to published sources cited, this account relies on reports about the negotiations given by those involved, in briefings, meetings and seminars.

[25] Initiatives in the 1920s, including a League of Nations draft convention, were resumed after the failure to ratify the Havana Charter of 1948, but were bedevilled by differences between capital-exporting and capital-importing countries: PETER MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW (1995), 573-4. Proposals from pressure groups resulted in the Abs-Shawcross draft of 1959, and the isssue was taken up by the OECD: see Resolution of the OECD Council adopted 12th October 1967 (Spain and Turkey abstaining), and Draft Convention on the Protection of Foreign Property, Text with Notes and Comments, reproduced in 7 I.L.M. 117 (1968). Another influence has been the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID Convention), U.N. Treaty Series No. 8359.

[26] Over 700 BITs were identified as of September 1994 in a comprehensive study prepared under the auspices of ICSID: RUDOLF DOLZER AND MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES (1995); but by 1st January 1997 the UNCTAD database listed 1,330 (UNCTAD, WORLD INVESTMENT REPORT 1997, 19, and annex Table B10), and currently the figure is estimated at 1630. Note however that not all have been ratified and entered into force.

[27] The May 1995 OECD Ministerial Council authorised negotiations aiming at reaching an agreement by May 1997 on a "broad multilateral framework for international investment with high standards for the liberalization of investment regimes and investment protection and with effective dispute-settlement procedures": William H.Witherell, *The OECD Multilateral Agreement on Investment*, 4 TRANSNAT'L. CORP. 1, 6 (1995); see also William H.Witherell, *An Agreement on Investment*, OECD OBSERVER No. 202, October-November 1996, at 6.

[28] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 1996. INVESTMENT, TRADE AND INTERNATIONAL POLICY ARRANGEMENTS, (1996) at 1-2.

There has also been a continuation of the significant changes in its composition which began in the 1980s, notably the trend towards broadening of FDI to include medium-sized firms, as well as changes in its sectoral composition beyond manufacturing to include a wide range of service industries. These trends are also associated with TNCs' increasing flexibility in the location of production or business activities, and hence in the way they access markets.[29] Firms can treat FDI and exporting as alternatives in their product sourcing and market access strategies, and can combine them to produce an optimal mix. Thus the choice of an investment location may be influenced by a range of business considerations, including regulatory factors. Finally, FDI has become more multilateral. In particular, from being mainly the primary source of FDI, the US has now also become its primary recipient; and a wider range of countries which were earlier exclusively recipients are now also sources.

The continued growth of FDI, and its multilateralization, certainly provides a key justification to policy-makers for the attempt to establish a more comprehensive international legal framework. Furthermore, the fact that the vast majority of such flows are still amongst OECD countries (85% of outflows and 65% of inflows) was argued to support the choice of the OECD as the negotiating forum.[30] The negotiators have also built on the experience with the OECD's other important instruments, especially its Liberalization Codes, which date back to the early days of the organization.[31] These are regarded as legally-binding, but although they entail undertakings to remove restrictions, existing controls could be maintained if declared as reservations, and it is only in the past 10 years or so that the actual commitments have hardened.[32] Notably, in 1984 the Capital Movements Code was extended to cover the right of establishment for FDI.[33]

Perhaps better-known in relation to TNCs are the OECD Guidelines for Multinational Enterprises, which were an Annex of the Declaration on International Investment and Multinational Enterprises of 1976, and are of a non-binding character. The Declaration adopted the Guidelines as recommendations addressed to firms,[34] as well as two other

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[29] Ibid. pp.99-103.

[30] Witherell, loc. cit. note 26 above (1996).

[31] OECD, CODES ON LIBERALIZATION OF CAPITAL MOVEMENTS AND OF CURRENT INVISIBLE OPERATIONS, originally adopted by the OECD Council on 12 December 1961: OECD/C(61) 95 and 96.

[32] Thus, the Capital Movements code commits members to the progressive abolition of restrictions or obstacles to all kinds of inward and outward investment flows exhaustively defined in Annex A. This commitment is monitored by a system of standstill and rollback, which requires each country to list exceptions, which are permitted in respect of most transactions (those in List A) only when an item is added to the list, or an obligation is extended or begins to apply to a state (art. 2(b)). Article 1(b) requires nondiscriminatory treatment of all non-resident-owned assets (i.e. MFN), and freedom to liquidate assets and transfer proceeds. The Current Invisibles Code operates a similar system in relation to current invisibles operations.

[33] This was done by adding, under Direct Investments, in the List A commitments (which are subject to country-specific exceptions) a note extending its coverage to the nondiscriminatory treatment of nonresident compared to resident investors in respect of the granting of licences, concessions or other authorizations. The Current Invisibles Code also gives a right of establishment for branches and agencies of foreign insurers.

[34] They establish standards in fairly general terms, covering information disclosure, competitive practices, tax compliance, employment and industrial relations policies, and technology transfer: see OECD, THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (1994). For the original Declaration and Decisions annexing

Decisions involving recommendations to governments, and a fourth agreeing to continuing consultations on these matters. The Decision on National Treatment laid down a post-entry national treatment standard for foreign-controlled enterprises from other member states;[35] while the statement on Investment Incentives and Disincentives recognized "the need to give due weight to the interests" of member states in this regard.[36] Finally, disputes between OECD member states regarding the vexed question of "extraterritoriality" have been dealt with within this framework, and have resulted in a statement on Conflicting Requirements embodying principles on the exercise of jurisdiction described as General Considerations and Practical Approaches.[37] These instruments, and the consultations and reviews under them resulting in "clarifications" or revisions, have produced a considerable body of OECD practice and policy.

Although discussion of international investment laws has generally focused on FDI, instruments such as the BITs define investment generally in very broad terms. This has become of greater relevance with the very rapid growth of portfolio investment flows during the 1990s, especially to "emerging markets". Foreign portfolio capital flows to developing countries (commercial bank lending, debt issue, and portfolio equity investment) have been estimated at $6-8bn p.a. in 1982-9, but jumped to over $32bn in 1992, and nearly $80bn in 1993, exceeding FDI and official lending, and far larger than the peak of commercial bank lending in 1982. However, these have shown considerable volatility, falling back after the Mexican crisis of 1994 to $69bn, before rising to a peak of over $125bn in 1996.[38] The dangers of this volatility became apparent again in the 1997 crises in Asia, the continuing repercussions of which have highlighted the potential problems of unrestricted and under-regulated private investment flows attracted to remote markets by the lure of rapid growth rates, which may in turn be dependent on exports into world markets. It has been argued that investment regimes should be structured to favour longer-term or "relational" investment such

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the Guidelines, see OECD, INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES (1976, revd. 1979, 1984).

[35] This was "subject to their needs to maintain public order, to protect their essential security interests and to fulfil commitments relating to international peace and security".

[36] Both these instruments have been revised by the OECD Council. In 1979 members were required to notify exceptions to National Treatment, and a procedure for Consultations between members was established for both instruments, through the CIIME. In 1984 the Council revised the decision on Incentives and Disincentives to cover "measures which provide significant incentives and disincentives" rather than only those "specifically designed" for those purposes, as in the earlier formulation. See OECD, DECLARATION BY THE GOVERNMENTS OF OECD MEMBER COUNTRIES AND DECISIONS OF THE OECD COUNCIL ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES, Revised Edition 1984.

[37] These were taken from the 1984 CIIME Review Report and endorsed by the Council: see the 1984 REVISED DECLARATION, idem., p.23.

[38] Figures for developing countries, defined as those having per capita income in 1996 below $9,635, are collected by the World Bank and published in WORLD BANK, GLOBAL DEVELOPMENT FINANCE, 1998. See also *Financial Markets and World Economic Growth: Perspectives towards the 21st Century*, speech by Daniel F. Adams, Vice President, International Finance Corporation to XIXth Annual Conference of IOSCO (International Organization of Securities Commissions), Tokyo, 19 October 1994. Figures for "emerging market economies" collected by the Institute of International Finance, are rather different, though they show the same trends: INSTITUTE OF INTERNATIONAL FINANCE, CAPITAL FLOWS TO EMERGING MARKET ECONOMIES, 29 January 1998.

as FDI.[39] The "boom in bank busts" has now been documented by experts at the main international financial organizations, who conclude that the opening of capital markets should go hand-in-hand with improvements in regulatory capacity, to avoid systemic problems for the international financial and monetary system.[40]

The crisis of the Asian "tigers" has contributed to the growing political opposition to the processes of globalization, which are seen as having been fostered by liberalization measures, especially by high-profile multilateral agreements such as those setting up the WTO and the NAFTA. It is questionable whether there would be substantial political support for further measures of international liberalization, without equivalent or related efforts to strengthen international standards and institutional capacities for the protection of financial systems, the environment, consumers, and labour. It is certainly not surprising that as reports began to emerge publicly about the MAI, it quickly generated a wide body of opposition. Those hostile to the agreement have generally argued that it over-emphasizes the rights of investors without any corresponding mention of responsibilities, and that it would tend to remove national regulation of firms without any corresponding effort to recognize or establish internationally-agreed business standards.[41]

Certainly, this gathering critique induced the negotiators to pay more attention to the need to placate a wider constituency. A formal Consultation with NGOs arranged by the OECD negotiators in October 1997 was attended by over 70 people representing more than 30 organisations from all regions of the world.[42] The growing negative publicity and criticisms pointing to potential adverse impacts on environmental and other standards also led to the introduction or strengthening of some safeguards clauses.[43] Nevertheless, it seems that the

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[39] Enrique Carrasco and Randall Thomas, *Encouraging Relational Investment and Controlling Portfolio Investment in Developing Countries in the Aftermath of the Mexican Financial Crisis*, 34 COLUM. J. TRANSNAT'L. L. 539 (1996). Jagdish Bhagwati has also recently argued that liberalization of capital flows is unlike trade liberalization, because it deprives countries of an independent economic policy and leaves them vulnerable to the propensity of short-term capital to panics and manias, and that the capital mobility ideology comes from the self-serving assumptions of a "power élite" based on the "Wall Street-Treasury complex": Jagdish Bhagwati, *The Capital Myth. The Difference between Trade in Widgets and Dollars*, 77 FOR. AFFS. 7.

[40] Morris Goldstein and Philip Turner, *Banking Crises in Emerging Economies: Origins and Policy Options*, Bank for International Settlements Economic Papers no.46 (1996). Gerard Caprio, *Safe and Sound Banking in Developing Countries. We"re Not in Kansas Anymore*, World Bank Policy Research Working Paper 1739 (1997).

[41] See generally RUTH MAYNE & SOL PICCIOTTO (EDS.), REGULATING INTERNATIONAL BUSINESS: BEYOND THE MAI (forthcoming, 1999).

[42] See Nick Mabey, *Defending the Legacy of Rio: The Civil Society Campaign Against the MAI*, in REGULATING INTERNATIONAL BUSINESS, op. cit.

[43] These were summarised in the CHAIRMAN'S NOTE ON ENVIRONMENT AND RELATED MATTERS AND ON LABOUR, Document DAFFE/MAI(98)10 of 11 March 1998 (also Annex 2 of the April 1998 Negotiating Text).. They were 3-pronged: (a) the inclusion of preambular language resolving to implement the agreement "in a manner consistent with sustainable development as reflected in the Rio Declaration ... and Agenda 21", and renewing their "commitment to the Copenhagen Declaration of the World Summit on Social Development ... and to observance of internationally recognized core labour standards" while noting that the ILO is the competent body to set and enforce those standards; (b) clarifications to the text, namely (i) confirmation that the National Treatment clause would apply only "in like circumstances"; (ii) a "right to regulate" clause covering measures considered appropriate to ensure that investment is undertaken in a manner sensitive to health, safety,

suspension of negotiations in April 1998 was largely due to doubts whether enough had been done to convince domestic political constituencies to accept a further impetus towards globalization, at least along neo-liberal lines. The nature of the internationally-coordinated campaign against the MAI seems to have left the negotiators feeling beleaguered, and led some to conclude that the experience "could fundamentally alter the way international economic agreements are negotiated".[44]

The Basic Structure and Scope of the MAI

The MAI, as it emerged from the negotiations, increasingly resembled a GATT for investments. The starting-point of the agreement is a broad non-discrimination obligation, requiring both National Treatment (NT) and unconditional Most-Favoured-Nation (MFN) treatment for all types of foreign-owned investments. This provides the basic ideological justification of the agreement, in the familiar liberal terms that foreign investors should be able to compete on equal terms with nationals, on a "level playing-field". Thus, proponents deny that the MAI is an attack on state sovereignty or entails the undermining of national regulatory standards, since all it requires is equal treatment. However, just as the GATT consists of an uneasy interaction between broad requirements for nondiscriminatory treatment and a series of exceptions, a similar structure is evident in the MAI. The underlying reason is also clear, and common to both agreements. A general obligation to treat like persons alike is mainly of symbolic value; its substantive content depends on how it is applied in specific regulatory contexts. This is especially so since a nondiscrimination obligation is usually imposed only in relation to persons who have previously been treated differently from others with whom they are now claiming parity. However, requiring an end to explicit differentiation may result in a shift to formal equality of treatment, within which substantive differences can still result in different outcomes. More specifically, if foreign investors are treated differently it is because they are in many respects different. To require equal treatment does not abolish all discrimination at a stroke, it simply opens up a series of questions about which differentiations are valid,[45] which can only be answered in relation to specific issues. Hence, it is not surprising

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or environmental concerns "provided such measures are consistent with this agreement"; (iii) a requirement that states should not waive or derogate from their own domestic health, safety, environmental, or labor measures as an encouragement to "an investment of an investor"; (iv) inclusion of an interpretative note to the Expropriation clause specifying that the inclusion of "measures tantamount to expropriation" does not establish a new requirement to pay compensation for losses due to "regulation, revenue raising and other normal activity in the public interest undertaken by governments"; and (v) inclusion of a proviso that the Performance Requirements article should not be construed to prevent measures (being neither arbitrary nor a disguised restriction on investment) necessary to secure compliance with provsions consistent with the agreement, or necessary to protect human, animal or plant life or health, or necessary for the conservation of living or non-living exhaustible natural resources; and (c) annexation of the OECD Guidelines on Multinational Enterprises to the text of the MAI without changing their non-binding character.

[44] Guy De Jonquieres, *Network Guerrillas*, FINANCIAL TIMES, 30 March 1998.

[45] This is sometimes explicitly indicated in nondiscrimination provisions by the addition of a "like circumstances" clause. Thus, the draft MAI NT and MFN clauses include such a clause, although at present it is square brackets. The same problem has been identified in relation to the General Agreement on Trade in Services (GATS), of which it has been said: "Striking the appropriate balance between, on the one hand, allowing regulators the freedom to make distinctions between services or products and, on the other, preserving liberal trading conditions, will be even more difficult in services than in goods": Aaditya Mattoo, *National Treatment in the GATS: Corner-Stone or Pandora's Box,* 31 JL. WD. TRADE, 107, at 107 (1997). However, the GATS only applies in relation to services for which a positive commitment has been made, which may be

that the bulk of the MAI consists of provisions for the special treatment of foreign investors, and dealing with the implications of nondiscrimination for specific measures.

The nondiscrimination article is also deceptive, as presently drafted, in two major respects. Firstly, it does not require the same or comparable treatment for foreign investors, but establishes a minimum of “no less favourable” treatment. Thus, it does not prohibit advantageous treatment of foreign investors in relation to nationals. In this respect it follows the precedent set by the BIT model and favoured by developed, capital-exporting countries, rather than the strict national treatment standard, originally put forward in the Calvo clause and advocated by developing countries.

This is exacerbated by the failure of the negotiations to tackle the problem of investment incentives.[46] Thus, the MAI as presently conceived will do nothing to deal with perhaps the biggest distorting factor for investment flows, the competition to attract investment. This is of special concern since it is often smaller countries with weaker economies which feel it necessary to offer incentives which they can ill afford. It also fails to prevent a regulatory “race to the bottom” which may occur by states offering special regimes for foreign investors, especially in “special economic zones”, or “export processing zones”.

That the effect of the MAI could be to give foreign investors privileged treatment can also be seen from the strict prohibitions of Performance Requirements. These go beyond the provisions of the WTO’s TRIMS agreement, which affirms the GATT principles of national treatment and prohibition of quantitative restrictions and provides an “illustrative list” of trade-related investment requirements deemed inconsistent with them. The MAI abandons any connection with equal treatment by establishing a flat prohibition of export, domestic content, domestic purchase, trade-balancing or foreign-exchange-balancing requirements. Yet such provisions could be seen as a means of ensuring fair competition in the domestic market between TNCs and local firms. The MAI also goes beyond such trade-related requirements and prohibits also obligations such as technology transfer, the location of headquarters or of research and development facilities, or the hiring of nationals - but such requirements are permissible if made as conditions for the “receipt of an advantage”. Combined with its failure to discipline the use of investment incentives, these provisions seem calculated to exacerbate the international competition for investments, and hence worsen the position of poorer countries less able to afford the offer of “advantages”.

Secondly, the NT article is drafted so as to give foreign investors a right of establishment. This may be considered to be a liberalization measure, in the same sense as the prohibition of quantitative restrictions in GATT art. XI. Undeniably, however, it is a major gain for international investors, since state sovereignty has generally been recognized as entailing the right to decide whether, and on what terms, to admit foreign investment. This is accepted in

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conditional on reciprocal commitments from others; furthermore, some services, notably Financial Services, are being liberalized within a specific sectoral regime.

[46] The draft indicates a wide disparity of views, ranging from delegations who consider that no provision on incentives is necessary, to some who argue for a prohibition on positive discrimination. It appears that if a provision is agreed it will at most provide for future negotiations, and perhaps transparency. The negotiators cite the difficulty of the problem, and the overlap with tax arrangements, as reasons for the weakness of this provision.

most BITs, with the notable exception of the US model.[47] The inclusion of a general right of establishment establishes a general "open door" principle for all investments, and thus has major implications for the MAI, and for its prospects of establishing a new multilateral standard for international investment.

The broad NT clause immediately brings into question the validity or application of a range of regulatory measures maintained by all states to some degree. These may be of a general character (e.g. laws on investment, privatization, competition, public procurement, taxation, intellectual property), or industry-specific (e.g. for banking and financial services, telecommunications, pharmaceuticals, motor vehicles, etc). Until now the right of establishment has largely been confined to regional economic integration arrangements, notably the EU and NAFTA.[48] In the Energy Charter Treaty, an industry-specific international arrangement, the right of establishment was not agreed, but left for a second phase of negotiations.[49] The GATS envisages a right of establishment under its mode 3 ("establishment of a commercial presence"), but only in relation to positive commitments by members in relation both to sectors and modes of supply, rather than a general right of establishment subject to a negative list of exclusions.

The deregulatory implications of the "nondiscrimination" provisions are reinforced by the explicit requirements for a special or minimum level of treatment for foreign investors contained in the Investment Protection provisions, which are broadly derived from BITs. These are designed to establish a minimum standard of treatment[50] at a higher level than could be said to have been generally accepted by states under customary international law.[51] The

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47 Until 1992 the US Model BIT (reprinted in DOLZER & STEVENS, op. cit. n.26 above) specified that each party "shall *permit and* treat" investment and activities associated therewith on a basis no less favourable than that accorded *in like situations* to investment or associated activities of its own nationals or ... of any third country" [emphasis supplied]. The MAI is more explicit, and follows the 1994 US Model, and the NAFTA provisions (arts. 1102 and 1103) in requiring NT and MFN to be accorded to investors "with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments". As mentioned above, the "like circumstances" phrase is at present in square brackets in the MAI.

48 The OECD National Treatment instrument (one of the decisions established by the 1976 Declaration on International Investment Multinational Enterprise) does not cover establishment. The Liberalization Codes have been extended to do so (subject to country-specific exceptions), although they relate to specific regulations and not all laws.

49 See Jeswald W. Salacuse, *The Energy Charter Treaty and Bilateral Investment Treaty Regimes*, in THOMAS W. WÄLDE (ED.), THE ENERGY CHARTER TREATY. AN EAST-WEST GATEWAY FOR INVESTMENT AND TRADE (1996), 321, at 335.

50 The wording in the MAI is "fair and equitable treatment and full and constant protection and security", a formulation based on the UK and US BITs.

51 The long-standing disagreements between capital-importing or developing countries and capital-exporting or developed countries on the right to nationalise, the duty to pay compensation, and its quantification, are well-known. Nevertheless, the closest to an international consensus on a general rule of international law must be said to have been expressed in the UN General Assembly Resolutions, especially Resolution 1803 of 1962 on Permanent Sovereignty over Natural Resources, and Resolution 3281 of 1974 establishing the Charter of Economic Rights and Duties of States (CERDS). These assert the primacy of a state's right to control all economic activity within the state, but accept a duty to pay "appropriate" compensation, as decided by the law of the host state. Capital-exporting countries have pressed for an "international minimum standard" for the

prohibition of expropriation goes beyond explicit acts of nationalization, since it includes "measures having equivalent effect", although these are not defined. However, there is an interpretative note on taxation which accepts that taxation measures may constitute either outright or "creeping" expropriation, but not if the measure is "within the bounds of internationally recognized tax policies and practices". Investors are also to be guaranteed free and immediate rights of transfer into convertible currency of all payments related to an investment, including compensation.

It also appears to have been hoped that multilateral agreement, at least among OECD countries, on an investment protection standard could have been used as the basis for common action against breaches of it, and thus help to resolve the long-running conflicts between the USA and other OECD states over the scope of retaliatory action. Measures enacted by the US Congress against Cuba (referred to as the Helms-Burton Act), Libya and Iran (the Iran-Libya Sanctions Act) have aroused opposition amongst most other OECD countries due to their "extraterritorial" scope, and blocking legislation has been passed by the EU,[52] Mexico,[53] and Canada.[54] In exchange for continued Presidential suspension of the controversial aspects of this legislation, the EU agreed to discuss in the MAI negotiations the development of appropriate "disciplines" to deter acquisition of or dealings in expropriated property.[55] This appeared to be a heavy burden for the MAI negotiations to bear, since there was strong opposition among the allies of the US to the more extreme aspects of the US position,[56] yet any agreement on this point would need to satisfy Senator Helms, whose support as Chair of the Senate Foreign Relations Committee would be crucial to ratification of the MAI.

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treatment of foreign-owned property, based on the "Hull formula", which specifies that expropriation is lawful only when carried out for a public purpose, without discrimination, and accompanied by "prompt, adequate, and effective" compensation. The most that can be said is that some compensation, falling short of "full" compensation, is usually accepted as payable, whether this is based on compensation settlements actually negotiated (often on a lump-sum basis) by states (see Richard B. Lillich & Burns H. Weston, *Lump-Sum Agreements: Their Continuing Contribution to the Law of International Claims*, 82 AM.JL.INT'L.L 69 (1988), or arbitration awards (Rudolf Dolzer, *New Foundations of the Law of Expropriation of Alien Property*, 75 AM. JL. INT'L. L. 553, Oscar Schachter, *Compensation for Expropriation*, 78 AM. JL. INT'L. L. 121 (1984). Measures taken by states to protect the interests of their investors range from overt and covert interventions, to the negotiation of BITs (A. AKINSAYA, THE EXPROPRIATION OF MULTINATIONAL PROPERTY IN THE THIRD WORLD (1980); A. Akinsaya, *International protection of direct foreign investments in the Third World*, 36 INT'L. & COMP. L. Q. 58 (1987), which cannot be taken as evidence of a generally accepted principle of customary international law (Andrew T. Guzman, Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, 38 Va. Jl. Int'l. L. 639.

[52] Council Regulation 2271/96, *Protecting against the Effects of Extraterritorial Application of Legislation Adopted by Third Countries*, OJ (L309) 39; in conjunction with a Joint Action by the EU Council under sections J3 and K3 of the Treaty of European Union.

[53] See 36 Int'l.Legal Materials 111 (1997).

[54] See 36 Int'l.Legal Materials 133 (1997).

[55] Memorandum of Understanding on the US Helms-Burton Act and the Iran & Libya Sanctions Act. EU-USA, 11th April 1997, 36 Int'l.Legal Materials 29 (1997).

[56] Title III of Helms-Burton in effect accepts claims to compensation by owners of property who were nationals of the expropriating state at the time, if they subsequently adopted US nationality. This goes beyond the scope of the MAI.

Nevertheless, in a statement of 18th May 1998, at the London EU-US Summit, in the context of the Transatlantic Partnership, US and EU leaders announced the conclusion of an Understanding aimed at resolving these conflicts.[57] It envisages the establishment of a Registry of Claims of illegally expropriated property, and the application of disciplines (mainly, government refusal of support for and discouragement of investment in such property) to transactions in property covered by such claims. However, these disciplines would apply only to transactions after 18 April 1998, and only where the claim has been adjudged to be contrary to international law.[58] The system is to apply immediately (in exchange for a waiver from the provisions of the Libertad Act), but the parties agree to prepare proposals for its incorporation into the MAI.[59] This is clearly a bold initiative, although it remains to be seen whether the details will receive the political support of their respective constituencies.[60]

These basic protective provisions must be read in conjunction with the extremely wide definition of investment and investor in the draft, with important implications not only for taxation, but also for other areas of regulation, in particular intellectual property. The definition of "investor" includes not only nationals but permanent residents, and "investments" includes all types of contractual rights, such as construction contracts, loans, claims to money or performance, concessions, and intellectual property rights. These may be "owned or controlled, directly or indirectly" by an investor.[61] Thus, for example, speculative positions in

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[57] The text of the Understanding was published on the website of the European Commission delegation in the US (www.eurunion.org), and details were given by Stuart E. Eizenstat, Under Secretary of State for Economic, Business and Agricultural Affairs, in testimony Before the House International Relations Committee Washington, DC, June 3, 1998.

[58] This could be (a) by an international arbitral tribunal or the courts of the expropriating state; or (b) according to "modalities to be elaborated among the participants or under the MAI" that the claim is well-founded and the claimant has not been afforded adequate judicial remedies; or (c) where, on the request of a participant which considers there has been a record of repeated illegal expropriations, evidence provided to the other participant is duly evaluated and accepted. Annex D of the Understanding provides assurances by the European Commission that, having evaluated the evidence provided by the US in respect of some Cuban claims, a number cases have been identified which appear to be contrary to international law, and that in relation to these and any similar cases "it is reasonable to assume" that the disciplines of the Understanding would be applied.

[59] The parties also agree to propose for inclusion in the MAI an article on Conflicting Requirements. A draft is appended to the Understanding, which would encourage states to avoid or minimise conflicts by "having regard to relevant principles of international law", following an approach of "moderation and restraint", and taking into account the sovereignty and legitimate law enforcement interests of other parties. This would be backed up by a procedure for consultations and consideration by the MAI Parties Group. This would be a milder alternative to the proposal, presumably tabled by Canada, for inclusion in the MAI of a prohibition on extraterritorial requirements imposed on investors, with a power for the Parties Group to grant waivers.

[60] Some initial reactions in Europe were negative: "The recent agreement is unsatisfactory since the EU was compelled to accept extremely precise disciplines on investments, while receiving in exchange nothing but a simple commitment from the American side to maintain the exceptions for European companies", was the opinion expressed by the Belgian Minister for Foreign Affairs, Mr Erik Derycke, at the Public Hearing on *Extra-territorial laws as unilateral sanctions* organized by the Committee on External Economic Relations of the European Parliament on June 24: EU Press Report of 29 June 1998.

[61] The clear inclusion of indirectly owned investments derives from US practice in BITs and from the NAFTA; the MAI also includes a "denial of benefits" article, also based on US practice, to exclude investments

financial derivatives channelled through a hedge fund incorporated in an offshore centre, but owned by residents of MAI member states, could be treated as a protected "asset". The breadth of this definition remains controversial, since it results from the elimination from an earlier draft of a balancing "negative list" of exclusions. Instead, the draft has since then included two footnotes indicating that "further work is needed" in relation to indirect investment, intellectual property, concessions, public debt, and real estate, and that an interpretative note is contemplated to the effect that a protected asset must have "the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk".

Protection, Liberalization and Deregulation

From this survey of its basic provisions, it can be seen that the MAI attempts to achieve its aim of establishing a "high standards" agreement, by taking the strongest protective and liberalization provisions from existing models, mainly the BITs (especially the US model BIT), and NAFTA chapter XI. Thus, the negotiators can justify their claim that the draft itself contains nothing especially innovative. Yet, as an ensemble it would clearly establish a qualitatively new standard. Moreover, the MAI does not merely offer a model for countries to use in bilateral negotiations, but aims to establish a multilateral arrangement which would in effect establish a single area for capital investments. Here lies its central paradox, for it attempts to do so simply through strong investment liberalisation and protection obligations. These would have the effect of destabilising many existing national regulatory arrangements, since they could be claimed to operate de jure or de facto in a disciminatory manner, or involve the expropriation of proprietory or contractual rights.

The investment protection provisions exceed not only the standard established by generally accepted customary international law, but also that of the Hull standard put forward by the US and other capital-exporting countries, since in the MAI it applies not only to property but also contractual rights. This point has recently been stressed by Guzman in relation to the US model BIT, which he points out "imposes obligations on host governments that exceed the traditional Hull rule" since it "applies not only to the expropriation of assets, but also to any 'breach' of an agreement".[62] These obligations inevitably restrict the sovereign powers of governments, and undermine any regulatory provisions which could be argued to interfere with contractual or proprietory rights.

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ultimately owned by investors of a non-Party, but routed through a Party via an enterprise having no substantial business activities there.

[62] Guzman, loc. cit. n. 51 above, at 656-7. Guzman makes his point in relation to BITs generally, but his article is based on the provisions of the US Model, without including any analysis of the differences among BITs. The UK Model BIT, for example, covers only investments directly owned by nationals or companies of either party. Most model BITs protect investments made by investors 'of' the other contracting party, usually defined as individuals who are its nationals, or legal entities formed under its laws or having their seat there: see e.g. the model agreements of Austria, Chile,China, Denmark, Germany, Hong Kong, and the UK, in DOLZER & STEVENS, op. cit., n.26 above, and UNCTAD, INTERNATIONAL INVESTMENT INSTRUMENTS: A COMPENDIUM (1996), esp. vol. III. The Dutch, French, Swiss, and US models however do include legal entities formed in third countries but owned or controlled even indirectly by investors of a contracting party: see discussion in DOLZER & STEVENS, loc. cit., at 36-42.

The MAI would also significantly depart from existing generally accepted international investment norms by requiring an "open door" to foreign investors, which most BITs do not.[63] A broad national treatment requirement including a right of establishment has been accepted in regional integration agreements, notably the EEC and NAFTA, and indeed the MAI draft is largely based on NAFTA chapter 11. However, much of the structure of NAFTA, and its political history, demonstrate the consequences of prioritising liberalization ahead of regulatory coordination or harmonization. The MAI envisages virtually no institutional structure: only a Parties Group whose task is to monitor the operation of the existing provisions of the agreement and approve accessions, and a Dispute-Settlement procedure for state-state and investor-state disputes. These dispute-settlement procedures are certainly a powerful element of the agreement, but they are essentially an enforcement mechanism, replacing the more political procedures of peer-pressure used under the OECD Liberalization Codes. As has been the experience with GATT and WTO dispute-settlement, they are likely to fabour market-access obligations over national regulatory requirements. The EEC at least established an institutional structure through which liberalization and regulatory harmonization could be pursued in tandem. Indeed, this has added a further complication for the MAI, since the European Commission has tabled a request for an exception to MFN for a Regional Economic Integration Organization (REIO), defined in terms which essentially are applicable only to the EU. This proposal raises issues similar to those familiar in relation to GATT art. XXIV. Its proponents argue that the institutional structure of a REIO permits deeper integration and hence more extensive liberalization, which they should not be required to accord to non-members. However, the scope of this clause is likely to be controversial,[64] especially in view of the plans for EU enlargement. The REIO clause is linked to the question of sub-national measures, which is also both controversial and significant, especially in relation to Australia, Canada, and the USA.

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[63] The negotiation of BITs was initiated in 1959 by Germany, and then taken up by other European countries. These agreements have been mainly political documents, attempting to strike a compromise with developing country governments anxious to attract foreign investments: see Guzman, op. cit. n.51 above. Increasingly, since the 1990s, Central and Eastern European countries and some developing countries have been concluding such agreements amongst themselves (UNCTAD, WORLD INVESTMENT REPORT 1997, 19). There was a significant shift with the publication of the US model BIT in 1980, which was more extensively and tightly drafted in legal terms. However, comparatively few countries have signed up to the US model, and acceptance of its terms did not gain ground until the early 1990s. By January 1998 the US had negotiated 41 such treaties, 31 of which had been ratified. Russia has not yet ratified the treaty signed in 1992, and none of the rapid-growth economies in east Asia and Latin America has ratified a BIT with the US, with the exception of Argentina (in 1991, entering into force in 1994). The Argentine treaty was a significant break-through, entailing the virtual abandonment of the doctrine enunciated by the Argentine jurist Carlos Calvo a century earlier, that property rights are a matter of the internal affairs of a country, and foreigners are not entitled either to diplomatic or military protection by their home country. As a remaining obeisance to the Calvo doctrine, the treaty includes a provision exceptional in US BITs, in its article III, reserving the right to regulate the admission of investments "provided, however, that such laws and regulations shall not impair the substance of any of the rights set forth in this Treaty". Although Argentina has experienced a growth in FDI, it has been surpassed by Brazil, which has far fewer BITs, and none with the USA (UNCTAD, WORLD INVESTMENT REPORT 1997, at xxii, 366). There seems no evidence that acceptance of a high-standards BIT is important to increasing economic growth, if anything the contrary.

[64] See Joachim Karl, *Multilateral Investment Agreements and Regional Economic Integration,* 5 TRANSNAT'L CORPS., 19 (1996).

Special Provisions, Carve-Outs and Exceptions

In order to deal with the interaction or potential incompatibility of its broad obligations with many areas of national economic regulation, the MAI's basic principles are supplemented by a range of exceptions, exclusions, and special provisions. The negotiators have tried to restrict these, for fear that the agreement would resemble a Swiss cheese. However, as the negotiation proceeded, and the implications of the basic principles for a wide range of regulatory regimes have become apparent, the carve-outs and exclusions have grown, so some now consider that there are more holes than cheese. These antinomies are central to the difficulties that the negotiation has encountered, and suggest that the basic principles of the agreement were a wrong starting-point.

The draft has long included some key special provisions or "disciplines", which in effect provide further obligations on states in relation to foreign investors. These include a Transparency obligation (to publish all laws, policies, and decisions of general application relating to the Agreement), and the Performance Requirements restrictions, already discussed above. Employment and immigration laws are also subject to a limited discipline in the provisions on rights of "temporary entry, stay and work" of investors committing a "substantial amount of capital", and of their executive, managerial or specialist employees, if they are "essential to the enterprise". This does not exclude the application of immigration and work permit laws, but states would be restricted from applying these laws on the basis of labour market or other economic needs tests, or quota systems, for such key personnel. Investors are also required to be given the freedom to appoint employees of their choice regardless of nationality, although a footnote indicates that this is not to be taken to exclude national anti-discrimination laws. The Privatization article, which appears still to be controversial, is likely to allow special share arrangements or other procedures which favour particular groups such as small purchasers or employees, provided they are not discriminatory against foreigners. The articles on State Monopolies and on Concessions have also been the focus of bargaining as OECD states seek to control the potential impact of the Open Door requirement.

Other special provisions have the character of exclusions or "carve-outs". Major carve-outs have resulted from the concerns expressed by specialists in particular areas of regulation once they were consulted on the basic provisions of the MAI. Thus, taxation will be carved out, except for the expropriation provisions, it having been accepted that fair tax treatment for international investment is dealt with under the network of treaties for the prevention of double taxation and fiscal evasion. Intellectual property (IP) raises more complex problems, which it is now clear cannot be resolved merely by modifying the definition of investment (unless to exclude IP altogether). IP specialists have pointed out that some IP management provisions, such as statutory or compulsory licensing or the allocation of remuneration under collective management schemes, could be construed as expropriatory and/or discriminatory, but there is not yet agreement on how to deal with this. Equally, there is no consensus yet on how to deal with the interaction between the MAI MFN and NT obligations and those of existing IP agreements, which are generally reciprocal rather than unconditional. They are also working on a number of other points of conflict between MAI obligations and IP regimes.

Even more central to the MAI is the question of its impact on financial regulation. Since the MAI covers all types of capital flows, even purely speculative ones, it would prohibit all controls designed to dampen volatility, such as Chile's deposit requirements, which in the aftermath of the Asian crises have drawn approval from authorities such as Stiglitz. Exceptions have been included for central bank transactions for monetary or exchange rate management purposes, and for Temporary Safeguards, provisions which were drafted with considerable involvement of IMF specialists. These apply only in the event of serious balance-of-payments or external financial difficulties, or in exceptional circumstances where capital movements cause or threaten damage to macroeconomic policies. Measures adopted must be temporary, proportional, and compatible with IMF obligations, and must be reported to both the IMF and the Parties Group, and a procedure would be established for their joint review and (dis)approval (in which event the dispute-settlement procedures are inapplicable). In addition, a special section has been drafted on Financial services, which exempts prudential measures "provided they are not used as a means of avoiding the Contracting Party's commitments or obligations under the Agreement",[65] and laying down some fair treatment rules relevant to this sector, in relation to matters such as authorization procedures, membership of exchanges and self-regulatory bodies, access to payments and clearing systems, etc. There are indications that some negotiators were uncomfortable with the special treatment of this sector, which is said to be justified by the special need for prudential measures. This appears to be the only industry in relation to which "fair treatment" rules are to be included. Others which might have been considered, e.g. telecommunications, transportation, have been left for negotiation presumably in other forums, and in the meantime will presumably be subject to exceptions or reservations.

In contrast to such special provisions and carve-outs, the General Exceptions article is very modest. At present, the main general exception covers actions which a Party considers necessary to protect 'essential security interests', taken in time of war or other international emergency, relating to nonproliferation of weapons of mass destruction, or concerning arms production. However, the exception is essentially self-judging, as dispute-settlement is limited to the right of other parties to consultations. Also excluded are measures in compliance with UN obligations for the maintenance of international peace and security, and a limited exception for action 'necessary for the maintenance of public order'. There is also a proposal on the table, supported by the French and Canadian governments (and strongly opposed by the US media industry lobbies) to exclude 'policies designed to preserve and promote cultural and linguistic diversity'.

Thus, the negotiators appear, so far, to have avoided creating any list of exceptions, such as was established in GATT article XX, which might require any balancing of national regulatory arrangements with the general liberalization and investment protection provisions of the MAI. On the other hand, many of the carve-outs and special provisions essentially fulfil that function in a more elaborate way, approaching that provided in the related WTO agreements such as the TBT and SPS, which essentially spell out the conditions for compliance with some of the article XX obligations. However, the proposals on Environment and Related Matters and on Labour,[66] made in response to pressures from NGOs, at present reject the need for general exceptions along the lines of GATT article XX, and are carefully drafted to ensure no conflict with, and therefore no need to balance against, basic MAI obligations.

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[65] This is likely to exclude measures restricting foreign ownership of banks or other financial institutions, although a World Bank study has indicated that some restrictions on foreign banks may be important to prevent cream-skimming and ensure more equal competition: see Ross Levine, Ross Levine, *Foreign Banks, Financial Development and Economic Growth*, in CLAUDE E. BARFIELD (ED.) INTERNATIONAL FINANCIAL MARKETS. HARMONIZATION VERSUS COMPETITION (1996), 246.

[66] For details see n. 43 above.

In addition to the carve-outs and special exceptions, the main method for reconciling MAI obligations with national regulatory arrangements is country-specific exceptions, initially referred to in the drafts as reservations. The terminology was changed, apparently to make it clear that, unlike normal reservations to treaties, they do not operate reciprocally, although a country may list an exception which is subject to reciprocity. Country-specific exceptions would "grandfather" existing measures particular to a member, and generally must be accepted by the other contracting parties at the time of signature or later accession. In some cases, a treaty may permit new exceptions to be made unilaterally,[67] although this is rather contrary to the principle of "grandfathering", which essentially aims to achieve "standstill", and potentially "rollback" of exceptions. Thus, every member would have its own Schedule, which would list any measures which it wished to maintain although they might be contrary to the basic obligations of the MAI. Thus, the MAI is a 'top-down' agreement, unlike in particular the GATS, which applies only as and when states make specific commitments, and is therefore considered 'bottom-up'. A bottom-up agreement would establish a framework within which the economic and regulatory implications of liberalisation could be considered sector-by-sector, as is occuring through the GATS. The MAI's obligations could be binding for up to 20 years, since parties would not be allowed to withdraw for five years from its entry into force, and it would continue to apply for 15 years from the date of notification of withdrawal to investments made by that date. Much therefore depends on the initial national schedules of exceptions, on which the MAI parties have held extensive negotiations, with the aim of reaching an acceptable "balance of commitments". It seems likely that exceptions would be divided into a List A and List B, to allow exemptions from standstill and rollback of some types of exceptions, and even that the possibility of reservations (based on reciprocity) would be introduced, perhaps to deal with matters such as the "cultural" exception.

CONCLUSIONS: TOWARDS A MULTILATERAL FRAMEWORK FOR INVESTMENT

Whatever the outcome of the MAI negotiations, lessons must be learned from them, and from the draft text, to inform subsequent negotiations for a more comprehensive instrument. As this analysis has shown, the combination of nondiscrimination and special treatment requirements in the MAI draft prioritizes liberalization, putting pressure on existing state measures of regulation. As with the GATT in the field of trade, the starting-point of a general liberalization obligation also produces a range of general and special exceptions and reservations, as well as "carve-outs" and special provisions, which provide a basis for justification for many measures. The main point is that liberalization requirements do very little to establish clear criteria for fair treatment in the specific contexts of particular industries or in the application of formally nondiscriminatory regulations (e.g. competition policies, or discretionary administrative measures). Hence, the MAI itself is an agenda opening up a range of issues about linkages between various regulatory arrangements affecting investment, just as the GATT increasingly opened up issues about trade-related regulatory measures from the 1960s onwards. As has been learned from the Uruguay Round and its aftermath, the question is how such linkages should be structured, to establish a sound and secure basis for global economic relations.

Such linkages may take several forms. Until now, they have generally consisted of the elaboration of compatibility rules. Thus, several of the GATT article XX exceptions have been supplemented by WTO agreements, in particular those on Technical Barriers to Trade (TBT)

[67] The US Model BIT allows a party to make new exceptions, although these must be notified to the other.

and Sanitary and Phytosanitary Measures (SPS). These may be described as *negative linkages*, since they presume that national measures must be disallowed unless they can be shown to comply with a relevant international standard. The MAI provisions on Monetary controls are of this type, providing criteria for valid controls plus a presumption that IMF-approved controls are MAI-compliant. Such provisions are needed, at a minimum in order to clarify the relationships between different and potentially conflicting international regimes. Some argue that the problem may be dealt with by treaty interpretation rules. However, the application of rules such as later-in-time or *generalia specialibus non derogat* is by no means straightforward. It is not clear, for example, whether GATT 1947, as re-incorporated into the Marrakech Agreement 1994, pre-dates or post-dates multilateral environmental agreements (MEAs) involving trade restrictions which were negotiated in the 1980s.[68] Nor is it clear whether the trade liberalization obligations of GATT should be regarded as more "specific" or more "general" than the trade restrictive provisions of a MEA. What is clear is that GATT prioritizes free trade, and is backed by compulsory dispute-settlement with the ultimately strong sanction of denial of market access. Thus, these types of "negative linkage" essentially introduce a downward ratchet on standards, by presuming the invalidity of national requirements, and failing to introduce internationally-agreed standards as a requirement.

A sounder framework for global economic integration requires the deployment of positive linkages, in order to strengthen the framework of internationally-agreed provisions harmonising regulation, or establishing global standards. An example of this is the TRIPs agreement which, whatever its other limitations, introduced an ingenious mechanism for establishing a minimum level of protection to facilitate trade in goods incorporating proprietary technology. By linking participation in existing IP treaties, as well as a set of minimum substantive and enforcement standards, to the trade regime, it helped to overcome the "enforcement gap" created by the temptation to free-riding inherent in the traditional liberal system for international rule-making.

What positive linkages might be appropriate for a multilateral investment framework? An agreement of the MAI type, although formally one between states, creates rights for private parties (investors), which may be enforced in national courts if directly applicable in national law, or through the arbitration procedures specified in the Dispute-Settlement provisions. Thus, it could be appropriate to create linkages both as a conditionality requirement for state participation in the agreement (as with TRIPs), and as a means of balancing investor rights with responsibilities. This would provide a means of giving a harder legal status to some of the soft-law Codes governing international business conduct which have been agreed over the past two decades. This could certainly apply, for example, to the OECD Guidelines for Multinational Enterprise, which at present the MAI proposes to annex but in a non-binding form. The Guidelines are clearly not drafted in such a way as to require them to be implemented by states in their internal laws. However, they do embody standards which it might be relevant for a court or arbitral body to consider in relation to a claim by an investor. Indeed, investors might themselves wish to cite the Guidelines to support a claim of discriminatory treatment. A similar status could be given to more specific Codes, such as the WHO Code on Marketing of Breastmilk Substitutes. Although some countries have enacted

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[68] This may be further complicated by specific articles in some treaties aiming to prevent conflicts, e.g. NAFTA: see MICHAEL J. TREBILCOCK & ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE (1995), at 351.

laws incorporating or based on this Code, many have not. Yet issues of compliance with the Code might be relevant, for example, to a complaint by a firm that it had been discriminated against in administrative decisions about hospital or health-care purchasing.

Perhaps more importantly, consideration should be given to establishing TRIPs-style linkages between a multilateral investment protection instrument and intergovernmental agreements establishing regulatory standards. For example, a key provision for investors is the freedom to make financial transfers, and this is broadly guaranteed in the MAI. Yet the largely unregulated character of the enormous volume of global financial business has given rise to increasing concern in the past 5-6 years. The MAI does little to improve international financial regulation, apart from exempting national prudential requirements and temporary monetary controls compatible with IMF obligations. The Basle Committee, after several years' work, has formulated a set of Core Principles for Financial Supervision, yet it has no means of inducing states to comply with these standards, except by relying on its prestige and perhaps by developing "shaming" procedures. Further, there is no mechanism available for protecting investors or firms from the temptation of using financial centres whose regulatory arrangements fall short of such internationally-agreed standards. This could be established if the right of free movement for financial transfers were limited to payments made to jurisdictions having financial supervision systems approved as Basle-Committee-compliant.

A similar linkage could be established in relation to international tax enforcement arrangements. The broad definitions of "investor" and "investment" in the MAI, as mentioned above, cover indirect investment. While this may be justified in order to cope with the complexity of international corporate structures, it will also necessarily create a further incentive, if one were needed, for special tax arrangements to be offered by countries wishing to attract the formation of intermediary holding companies of various sorts. The carve-out for taxation proposed in the MAI assumes the existence of bilateral tax treaties, but does not condition the right to make transfers on the existence of such a treaty bteween the source and destination countries of such a transfer. Such a condition would provide an incentive for the negotiation of appropriate treaties, or else a disincentive for firms tempted to to seek tax advantages by incorporating intermediaries in dubious jurisdictions. More ambitiously, the MAI, or a future global arrangement regulating international investment, could be part of a broader package, which could include international agreements aimed at improving regulatory standards and cooperation. Some of these could be made mutually conditional, while others could be associated, and participation in them encouraged by peer-pressure methods. For example, the OECD itself (in conjunction with the Council of Europe) negotiated a multilateral Convention on Mutual Administrative Assistance in Tax Matters of 1988, which however has received only a handful of ratifications. If participation in this treaty were a condition of accession to the MAI, it would provide a great encouragement to the international tax enforcement effort, one which is sorely needed.

If we look beyond the MAI, therefore, to a more ambitious prospect, we should ask what international agreements or codes should form part of a package setting up a Multilateral Investment Organization. Such a perspective is not one that seems to be part of the present negotiating agenda. It is certainly easy to find objections and political obstacles to such an approach. In particular, governments of less-developed countries understandably react suspiciously to attempts to impose on them unnecessary regulatory requirements which might hinder their development. Thus, the emphasis should be on the identification of core standards in every relevant area. When this is done, it is not just less-developed countries who are found to be at fault, even in the case of the core labour standards of the ILO, or the tax assistance arrangements cited above, some of the most developed countries are found to be failing. Participation in international arrangements establishing substantive and enforcement standards is only too often hard to achieve due to short-term calculations of immediate advantages. The creation of conditionality by the appropriate use of linkages might help to create an upward ratchet for regulatory standards towards internationally-agreed minima, rather than the downwards ratchet created by the present tendencies to prioritize liberalization. It could also help to create a wider confidence that a more integrated world economy could be built on stronger regulatory foundations.