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Developing Countries and the Practicality of Multilateral Investment Agreements on Telecommunications

Abstract. During the past few decades, foreign investment has rapidly increased worldwide and has enhanced economic growth in developing countries. Although foreign investment brings huge economic benefits, many developing countries fear that by opening up markets to competition and foreign investment without restriction, they will lose control of their strategic industries. Among those industries, telecommunications is a sector with substantial impact and influence on national security, social stability and economic development. Therefore, the balance between economic gains from foreign investment and national telecommunications sovereignty presents a challenging task. A proposed international investment agreement has been negotiated in international community to possibly solve many of the disputes between foreign investment and national sovereignty. However, is foreign investment a necessary mechanism for developing countries to promote their economic growth? With different developmental models and a myriad of different economic difficulties, is a uniform global investment instrument suitable to meet the different demands for developing countries? This article will examine current international investment regime *and their relation with telecommunications as an influence in developing countires. Assessing these crtitical issues, this article hopes to find a new poisition for telecommunications in a formingly integrated global market.*

Keywords: Foreign Direct Investment (FDI), Multilateral Agreement on Investment (MAI), Developing Countries, Telecommunications, Technology Transfer, Markets Competition, Organization for Economic Cooperation and Development (OECD), Multinational Enterprises (MNEs), Bilateral Investment Treaties (BITs)

I. Introduction

Telecommunications sector plays a dual role in economic activities, not only itself a distinct circle in economic system but also a supplying mean for other sectors. Having this kind of special characters, telecommunications cover and relate to many other industrial and economic sectors such as manufacture, entertainment, and communication sectors. Foreign investment has been one

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of the most important driving force in the exploration of natural resources and improvement of economic conditions in underdeveloped and developing countries for centuries. Recently, foreign investment has not only increased rapidly but also covered a wide spectrum of industries around the world. The role of foreign investment has played a more and more important role in the world's economy. Generally speaking, foreign investment money will spur economic growth and create a better living standard in the newly invested countries. From an economic standpoint, international investment mutually benefits both sides of the investing and invested countries; however, there is still not an international investment regime or thorough international agreement that fairly addresses both sides. Although foreign investment brings abundant funds and advanced technology, many developing countries fear that by opening up their markets to competition without any restriction, they will be forfeiting economic guiding power and lose control of strategic industries.

Among FDI, telecommunications is one of the most strategic industries of national economic control. Even though foreign investments on telecommunications will bring advanced technological skills, large amount of funds, as well as market competition and will benefit national telecommunications development, many countries guide policy and legal requirements to control foreign investment to correspond to their economic and developmental demands. Telecommunications have a substantial and important influence on national security, social stability and economic development, as well as many industrial sectors. Due to its particular character, telecommunication industries are often state-operated and monopolized in many countries. Therefore, the balance between economic gains from foreign investment and national telecommunications sovereignty presents a challenging task.

This article will be divided into four parts to discuss business aspect of telecommunications on investment. This article will examine international investment regimes including the meaning of Foreign Direct Investment (FDI), the proposed Multilateral Agreement on Investment (MAI), and their relation with telecommunications as an influence in the global economic market. From the standpoint of foreign investment, this article hopes to find a new poisition for telecommunications in a formingly integrated global market.

II. Foreign Direct Investment (FDI) and Telecommunications

1. Meaning and Economic Benefits of FDI

Over the past two decades, FDI has been one of the most important driving forces for the world's economic growth. According to the US Department of Commerce, FDI is a direct investment which "implies that a person in one country has a lasting interest in, and a degree of influence over the management of, a business enterprise in another country."[1] The US Commerce Department defines FDI as "ownership or control by a foreign person of 10 percent or more of an enterprise's voting securities or the equivalent", which is deemed enough to influence management decisions.[2] At a Global Investment Forum hosted by the United Nations Conference on Trade and Development[3] (UNCTAD), it was reported that "there was a strong feeling among ministers from some developing countries that more research and analysis was needed about the critical issues at stake in a multilateral framework on investment ... and many speakers stressed the complexity of the issues related to the effects of economic policy liberalization on the quantity, quality and distribution of FDI, and its impact on development."[4]

Requiring sufficient economic information and abundant funds, foreign investment is always accompanied by higher risks. With such risks, foreign investment also comes with the possibility of much greater returns. Traditionally, foreign investment has been very closely related either with trade or with an international development agency. Most current foreign investment thus has either been the result of someone taking a huge risk or the result of an international organization such as the World Bank underwriting that risk. Meanwhile, international developmental agencies often pursue the more enlightened goal of helping countries develop properly rather than seeking the greatest return.[5]

[1] US Department of Commerce, Economics and Statistics Administration, Bureau of Economic Analysis, Foreign Direct Investment in the U.S.: 1992 Benchmark Survey, M-3.

[2] *Ibid*, Foreign Direct Investment in the U.S.: 1992 Benchmark Survey, M-3.

[3] Established in 1964, the UNCTAD aims at the development-friendly integration of developing countries into the world economy. UNCTAD is the focal point within the United Nations for the integrated treatment of trade and development and the interrelated issues in the areas of finance, technology, investment and sustainable development. Source available on http://www.unctad.org

[4] Foreign Direct Investment and Economic Development—Lessons from Six Emerging Economies; This report was presented at an OECD-DNME Workshop on Foreign Direct Investment held in Mexico City 1997. The information has been updated up 1998.

[5] Stan Ng: *"Background Information on the Multilateral Agreement on Trade"*; see http://darwin.bio.uci.edu/~sustain/issueguides/MAI/MAI-Background.htm

The benefits of foreign investment include promoting economic growth, technology transfer and job-creation in the local economies. It is assumed that exports would increase since a large part of exports is comprised of shipments from domestic companies to their foreign affiliates. Technology transferred from foreign investment projects will improve the efficiency of local firms as well. These effects become the major attractions for developing and under-developed countries seeking foreign investment.[6] In addition, FDI can serve to integrate domestic markets into the global economic system far more effectively than could have been achieved only by traditional trade flows. The benefits from FDI will be enhanced in an open investment environment with a democratic trade and investment regime, active competition policies, macro-economic stability and privatization and deregulation.[7] Under such conditions, FDI can play a key role in improving the capacity of a country to correspond to global economic integration and future national developmental strategies. In practice, the greater the openness and freedom toward FDI, the more economic reforms and potential benefits that receiving countries will reap.[8]

2. Policy Requirements of FDI and Multinational Enterprises

Although FDI implicitly brings large economic benefits and potentially attracts numerous business opportunities, many countries are only partially open to foreign investment or even refuse business with foreign enterprises. Those countries believe they will be losing the control power over the local economy by inviting foreign investment. They often use performance requirements such as exporting requirements or technology transfer agreements to control the categories and sizes of FDI. For many countries, performance requirements on foreign investment were considered necessary and desirable to ensure that the activities of foreign capitals are consonant with local countries' developmental strategies.[9] The same decline in effectiveness can be seen in terms of policies designed to maximize the potential benefits from inward investment. However, since it has been acknowledged that FDI can stimulate economic growth and national development, there remains a tremendous diversity in countries'

[6] Sforza, M.—Nova, S.—Weisbrot, M.: *Writing the Constitution of a Single Global Economy: A Concise Guide to the Multilateral Agreement on Investment—Supporters' and Opponents' Views,* also see http://www.preamble.org/MAI/maioverv.html

[7] *Ibid*.

[8] See http://www.preamble.org/MAI/maiweb.html

[9] Thompson, H. B.: Investing in the Global Information Infrastructure. *Telecom '99 Keynote Panel: Investing in Communications Companies;* Geneva, 1999.

approaches on their policies towards FDI. Countries can also screen incoming investment and retain control on foreign participation in particular sectors.[10] Those measures are designed to certify local government can still retain the final decision on economic policies and ensure foreign investment will not cause negative effects on national development.

Due to the increase of international trade and the advent of internationalization, more and more industrial firms from different countries are expanding their business scale through foreign direct investment, and these cross-nation companies have gradually formed as multinational enterprises (MNEs). Different from traditional small-scale foreign investment, direct investment by MNEs has the potential to restructure local industries rapidly and to transform local economies into prodigious exporters of manufactured goods or services to the global market.[11] Targeted at huge benefits of the international market, almost all economies now compete to attract huge investments from those MNEs. Integration with the global economy does not merely come through direct exports from foreign-owned companies, but it also derives from the presence of foreign MNEs in sectors providing goods and services to exporters. As foreign affiliates of MNEs become more oriented toward the global market and less dependent on the domestic market, and as the number of countries eager to attract FDI grows, the tolerance of foreign investors for barriers and restrictions on their operations is likely to be much less than in the past.[12] When more and more economies tend to compete for FDI and MNEs, foreign investors now consider not only economic conditions of invested countries such as the location of natural resources or labor force, but also local economic policies. Other relatively new factors include whether distort investment exist, where corporations are chartered, and how real estate and other fixed assets are regulated. Under this trend, the policy requirements of FDI gradually deregulated in many countries and a more open attitude toward FDI has been adopted.

3. Arguments about FDI in the Global Economy

The economic problems of underdeveloped and developing countries are fundamentally different from those of developed countries and require different measures and policies. Since the 1950s, it was recognized that "late industrialization countries" required even greater protection and state intervention than even the most developed countries had relied upon during their early

[10] *Ibid*.
[11] See http://www.oecd.org/daf/cmis/fdi/fdisix.htm#execsum
[12] *Ibid.,* also see *supra note* Thompson, 1999.

development.[13] For underdeveloped or developing countries, FDI would undermine many of their development strategies and developmental processes. For example, in Mexico, most people seemed to be economically better off under a more authoritarian regime.[14] Prior to international trade and investment liberalization, Mexican economic growth was fairly rapid, at a real per capita rate of 3.9% in the 1960s and 3.2% in the 1970s. Since the 1980s, after liberalization began, per capita income has stagnated and real wages have actually fallen.[15] Economists have pointed out that the instability of international financial markets was a major cause of the previous 1994 financial crisis in Mexico.[16] The effect of such disinvestments with Mexico, therefore, should be questioned whether or not the deregulation of international capital flows is in the best interest of "emerging market" economies.[17]

Likewise, in South Korea, many economic regulations that were prohibited by the national treatment provisions were essential to economic growth and development. The Korean government used measures like subsidized credits, tax and tariff exemptions and export subsidies to intervene against foreign investment. They targeted industries such as cement, fertilizer, steel, chemicals, and consumer goods, etc. FDI was restricted and played a minimal role in South Korea's industrialization and economic development.[18] After Asia's financial crisis in 1997, the IMF required the Korean government to take measures for internationalization and deregulation, including the removal of a number of restrictions on foreign ownership of domestic stocks and bonds, residents' ownership of foreign assets, and overseas borrowing by domestic financial and non-financial institutions.[19] The sharp reduction in government planning and industrial policy has caused problems such as overcapacity in the petrochemical industry, over-investment, and corporate failures in industries.[20] Meanwhile, the

[13] Gerschenkron, A.: *Economic Backwardness in Historical Perspective: A Book of Essays.* Cambridge, Harvard University Press, 1966.

[14] See Maddison, A.: *Monitoring the World Economy 1820–1992,* 1995, 78–79.

[15] *Ibid*.

[16] Calvo, G.—Mendoza, E.: Reflections on Mexico's Balance of Payments Crisis: A Chronicle of a Death Foretold. *Journal of International Economics,* 1995, 235.

[17] See *supra note* Weisbrot, 1998.

[18] See Westphal, L.: Industrial Policy in an Export-Propelled Economy: Lessons from South Korea's Experience. *Journal of Economic Perspectives*, Vol. 4, No. 3, Summer 1990, 41–59.

[19] Chang, Ha—Joon, Hong—Jae Park—Chul Gyue Yoo: 1998. Interpreting the Korean Crisis—Financial Liberalization, Industrial Policy, and Corporate Governance. Draft of forthcoming article in *Cambridge Journal of Economics*, Vol. 22, No. 6, 9–14.

[20] See *supra note* Chang, Ha—Joon, Hong—Jae Park—Chul Gyue Yoo, 1998.

1997 Asia Financial Crisis, one of the world's worst economic crises since the Great Depression. The crisis engulfed much of Asia including South Korea, Thailand, and Indonesia caused by the set-off of hot money prior to August 1997, and then a true panic when the Thai baht began to fall. The liberalization of international investment was struck by the Asian financial crisis and economists pointed out that the liberalization of international borrowing and investing in those countries over the last decades created the instability from which the crisis was born. One economist has noted, "The Asian crisis cannot be separated from the excessive borrowings of foreign short-term capital as Asian economies loosened up their capital account controls and enabled their banks and firms to borrow abroad. It has become apparent that crises attendant on capital mobility cannot be ignored."[21] The reversal of capital flows amounting to eleven percent of the regional GDP was a result of foreign and domestic investors stampeding for the exits for fear of being caught with greatly depreciated local currency and assets.[22] Economists who supported increasing deregulation of international investment have recently begun to concede that a large number of workers have indeed been hurt by such a process. On the other hand, foreign investors take into account all relevant information affecting asset returns when deciding their market positions and would be hard pressed to explain future disinvestments from these countries.[23] The OECD has just issued a report intended to make the case for international investment liberalization where they contend that such negative impacts are "at most, modest".[24]

4. Meaning of FDI on Telecommunications

Foreign direct investment on telecommunications comprises the ability to establish a commercial presence in a foreign territory, or the purchase of telephone companies by foreign investors or joint ventures between local and foreign partners to establish new telecommunication service companies. Historically, the opportunities for foreign investment in the telecommunication services sector have been limited by the fact that most countries had state-

[21] See Jagdish Bhagwati: The Capital Myth: The Difference Between Trade in Widgets and Dollars, *Foreign Affairs*, 1998, 8. Jagdish Bhagwhati, one of the world's leading international economists and the Economic Policy Adviser to the Director-General of the GATT (1991–93).

[22] Weisbrot, M., 1998: Globalization for Whom? *Cornell International Law Journal*, Symposium Issue, Vol. 31, No. 3.

[23] See *supra note* Weisbrot, 1998.

[24] *Open Markets Matter: The Benefits of Trade and Investment Liberalization*, OECD, 1998, 11.

owned monopoly telecommunication carriers. Since 1984, however, forty-four Public Telecommunication Operators (PTOs) have been privatized raising 159 billion US dollars with about one-third of this investment coming from outside the home countries.[25] Obviously, fueling the operation of old PTOs, foreign investment has gradually played a more important role in either domestic or international telecommunication market. For increasing the proportion of foreign investment on telecommunication sectors, foreign capital now has raised either through a share offering or the sale of a minority share of a PTO to foreign partners. Under the process of privatization of telecommunication industries, there are increasing numbers of opportunities for foreign investors to establish foreign subsidiaries or to combine with others in joint ventures.[26]

On the other hand, because telecommunications covers many other industrial sectors including the sectors of manufacture, entertainment, and communication, it has a dual role as both a traded product and service, and as a facilitator of trade in other products and services. Liberal foreign investment on telecommunications will promote more economic gains including new and improved telecommunication products and services with lower prices and additional investment on other industrial sectors. Opening foreign investment on the telecommunication services sector should result in more competition, lowering prices for most businesses and for many consumers and providing both with a choice of different service providers.[27] FDI brings not only new technology and developmental funds to telecommunications industries; it also brings innovation and competition for telecommunications providers. These positive effects promote the capacity of telecommunication in underdeveloped and developing countries and benefit the formation of "world village."

5. FDI and Global Telecommunication Development

Telecommunication development represents not merely expanding the number of telephone lines per hundred inhabitants, but it enhances the heightening of culture exchange, business opportunities, education promotion and new technology invention. However, many countries still have fewer than 10 telephones per 100 inhabitants while about half of the population are waiting

[25] *Public Telecommunication Operators for Sale*; Value of privatizations of PTO's, by region, 1984–1996 and over time, 1990–1996; ITU Telecommunication Privatizations Database.

[26] 1996/97 World Telecommunication Development Report, Trade in telecommunications, Executive Summary; also see http://www.itu.int/plweb-cgi/

[27] See *supra note* 1996/97World Telecommunication Development Report.

for a telephone, and the other half waiting for a dial tone. They live in rural and often isolated areas where most of the natural resources are located. Access to information and telecommunications is essential for development of such areas but is still inadequate or non-existing. It was reported that there are still 43 million people on registered waiting lists for telephone connections in emerging markets with the average waiting time longer than a year.[28] By introducing foreign investment into those areas, waiting lists can be sharply reduced. At this point, the role of foreign investment on telecommunications is not a market competitor but a basic service provider.

For most developing and developed countries, foreign investment on telecommunications is not merely a provider for improvement of local telecommunication equipments but also a driving force for telecommunication market competition and transformation. Seeing the huge benefits from foreign investment in telecommunications, a large portion of the world hopes to attract foreign investment to pursue a schedule of projects to improve the basic telecommunications infrastructure. First, to attract more foreign investment and making market competition, developing countries privatized their public telecommunication operators at the start of the 1990s.[29] By deregulating domestic telecommunication regimes, it is expected that local telecommunication markets will be more efficient and attractive for foreign firms especially those MNEs. Second, to attract more foreign investment and to operate toward an integrated global economy, countries have to make more available high-speed data networks, cellular radio, mobile satellite services, Internet access and facsimile for foreign firms. By deregulating domestic telecommunication regimes and upgrading the level of telecommunication methods, these countries expect that FDI or MNEs would have more willingness to choose them as a base for future global telecommunications competition. In developed countries, they have concentrated more on recognizing telecommunications trends and have tried to satisfy the complex requirements of multinational enterprises. Both developed and developing countries face the same pressure to upgrade and diversify the telecommunications sector, but developing countries typically have less financial, technical and operational resources to do so, particularly in light of

[28] Integrated Rural Development and Universal Access; Brief description of ITU's Buenos Aires Action Plan Programme Nos. 9 & 12 (Valetta Action Plan Programme 3) 1998; also see http://www.itu.int/ITU-D-UniversalAccess/reports/ PPstatus981016.htm

[29] See *supra note* 1996/97 World Telecommunication Development Report.

an incomplete basic infrastructure.[30] The best way to resolve this dilemma and to attract foreign investment for business and basic telecommunication infrastructure will be through upgrading the technology skill of the labor force and the privatization of public telecommunication regimes.

In the Asia-Pacific region, telecommunications market reform has continued apace with developing countries such as the Philippines, Taiwan and Thailand, and has opened up their markets to foreign investment. In Latin America, several countries that first privatized their domestic operators at the beginning of the decade are now preparing for a second round of market-openings. Even Africa, which has long been the last bastion of telecommunication monopolies, is leading the way by attracting foreign partners investing in their telecommunication sectors.[31] Foreign private investment has entered the developing markets through joint ventures with local telecommunication operators, the award of licenses to foreign companies, or the sale of equity stakes in state-owned telecommunication entities to private foreign investors. Private investment was initially permitted mostly in value-added services, but increasingly, it is entering the basic services as well.[32]

In Latin America and Africa, privatizations have been conducted through the sale of an equity interest in the company to foreign strategic investors such as France Telecom, Telekom Malaysia and SBC of USA.[33] Privatization and increased foreign investment in telecommunication markets has resulted in substantial progress in meeting developing countries' basic telephony upgrading goals. It is also expected that market competition as a the provision of international and domestic telecommunication services will bring a significant reduction in prices and more parity between domestic and international telephone services. Where markets have been liberalized, the level of investment, particularly foreign investment, has generally increased and telephony and network development has proceeded more rapidly. This combination of competitive markets, private ownership and foreign investment has created an appropriate environment for next generation global telecommunications development.

[30] Sir Maitland, D.: *'The Missing Link': Still Missing 8 Years Later?* Proceedings of Seminar on Telecommunications and Its Role in Socio-Economic Development, ISBN 87-984401-0-1, 5. (Copenhagen, 1992).

[31] Dr. Tarjanne, P.: *Telecommunications and World Development: Forecasts, Technologies and Services,* ITU Forum ITA, Moscow, 1997.

[32] Dr. Chasia, H.: *Forum De Crans Montana*, Deputy Secretary-General ITU; Session of Saturday 27th June Crans Montana, Switzerland, 1998.

[33] See *supra note* Dr. Chasia, H.: Forum De Crans Montana.

6. FDI on Telecommunications and International Organizations

The telecommunications sector is currently undergoing a transition from a global market system for telecommunication services that has been based on multilateral arrangements. This should foster a suitable international environment where investment and entrepreneurship can prosper, including the development of new forms of electronic commerce. For FDI in the Telecommunications sector, the WTO and ITU are two of the most important international organizations. The WTO agreement hopes to promote foreign and domestic investment in the telecommunication sector and, as a consequence, the development of each country's telecommunication infrastructure and services.[34] Under the WTO, GATS on Telecommunication which was concluded on February 1997 and which entered into force on February 1998, commits 72 countries to a program of progressive opening of their basic telecommunication service markets to competition and increased foreign investment.[35] Those agreeing countries made commitments to liberalize their telecommunication market and to open up to foreign investment in basic telecommunication services. That is, the provision of voice telephone, telex, telegraph, data transmission and privately leased circuits.[36]

On the other hand, the ITU provides great benefits in terms of telecommunication infrastructure construction and the development of information processing industries. The ITU allocates a global spectrum to particular services and manages scarce communications resources among countries that benefit trade liberalization and the prevention of discrimination between domestic and foreign suppliers. The ITU also promotes global telecommunication development and plays the role of providing the information to let developing countries understand the benefits that liberalization and trade in telecommunications can bring, as well as the measures necessary to protect national interests.[37] Both WTO and ITU encourage the development of global telecommunication infrastructure and the formation of an integrated global telecommunication market. Global telecommunication development tends to strengthen the leadership role of the private sector in the development of a

[34] Second Draft of the Secretary-General's Report to the Second World Telecommunication Policy Forum on Trade in Telecommunications; ITU Geneva, 1997.

[35] Third Draft Of The Secretary-General's Report To The Second World Telecommunication Policy Forum on Trade in Telecommunications; ITU Geneva, 1998.

[36] First Draft of the Secretary-General's Report to the Second World Telecommunication Policy Forum on Trade in Telecommunications; ITU Geneva, 1998.

[37] See *supra note* Dr Tarjanne: *Telecommunications and Trade.*

diverse, affordable, and accessible information infrastructure around the world. Under this trend, it also hopes to promote the involvement of developing countries in the building and utilization of a truly global and open information infrastructure and facilitate activities and identify policy options that foster the effective global application of telecommunications, broadcasting, and information technologies and services.[38]

7. FDI on Telecommunications and Economic Growth

Investment in telecommunications is a prerequisite for broad based economic development. The dual role of telecommunications as both a traded service and a vehicle for trade in other service sectors means that price reductions, improvements in the level of investment and the development of infrastructure and services brought about by liberalization should also have an impact on other sectors of the economy.[39] In addition, efficient, low-cost telecommunication networks will provide the necessary platform for the growth of electronic commerce. The implementation of liberalized telecommunication investment should produce significant benefits not only within the country's telecommunication sector but also for the national economy as a whole. The opening of telecommunication markets has facilitated the entry of domestic and foreign private capital and technological skills that have in turn accelerated network build-out, the provision of new services and improvements in the quality of service. Market liberalization also has a profound effect in promoting development in other sectors such as information technology and computing, which depend heavily on good, reliable and low-cost telecommunications.

Economic development in these sectors indeed has been constrained in many countries because of the lack of an adequate telecommunication infrastructure to service them.[40] Inadequate telecommunications also reduces efficiency throughout the economy, diminishes the effectiveness of investments and development programs, causes a comparative disadvantage in attracting investment, and lowers the quality of living standard as well as personal access to communication. The evidence leaves no doubt that there was indeed a correlation between economic development and investment on telecommunications.[41] Throughout

[38] See *supra note* Thompson, 1999.

[39] See *supra note* Third Draft of the Secretary-General's Report to the Second World Telecommunication Policy Forum.

[40] *Ibid*.

[41] Frieden, R. M.: *Social, Logistical and Development Issues in The Global Information Infrastructure.* Penn State University, USA.

economic developmental history, telecommunication infrastructure has played an important role in supporting the economic development of counties. There are numerous documented examples about the direct relationship between investment in telecommunication infrastructure and economic growth. The growth of global telecommunication development will bring rapid expansion of new and advanced information services, attract more domestic and foreign investments, and improve economic development and global competitiveness, as well as a better living standard of health care and education.

III. Multilateral Agreement on Investment (MAI) and Telecommunications

The MAI is a new international investment agreement currently being negotiated at OECD that establishes rights for foreign investors. It is designed to make it easier for individual and corporate investors to move capital across international borders. The MAI is mainly based on the investment provisions of the North American Free Trade Agreement (NAFTA) and expands these provisions into all economic sectors in the 29 members of OECD.[42] Non-OECD members will also be asked to join this agreement. The major aim of the MAI is to ensure that foreign investment from individuals and multinational corporations can move capital in and out of countries without governmental interference.

1. Historic Overview – OECD and MAI

a) Organization for Economic Cooperation and Development (OECD)
Founded in Paris, France, the OECD was originally established as the Organization for European Economic Cooperation (OEEC) to help rebuild the European economies after World War II.[43] In 1961, after economic reconstruction in Europe was mostly accomplished, USA, Canada and the European countries decided to form OECD in place of OEEC to serve as a forum to conduct research and negotiations on global trade and investment.[44] Currently, there are 29 members representing the most high-income countries in OECD.[45] The

[42] See http://www.preamble.org/mai/bits.html
[43] See http://www.oecd.org/about/origins/index.htm
[44] See http://www.oecd.org/about/general/index.htm
[45] See http://www.oecd.org/about/general/member-countries.htm. OECD member states include Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxemburg, Mexico,

OECD has previously created two codes on investment liberalization: the Code of Liberalization of Capital Movements and the Code of Liberalization of Current Invisible Operations.[46] Unlike the UN, OECD is not a quasi-parliamentary body, and has no supranational legal authority over individual members. Instead, OECD members have relied upon "peer pressure" to encourage compliance with the Codes.[47]

b) Brief History of MAI Negotiations

The seeds of the MAI can be traced back to the 1960s, when member countries adopted two binding OECD Codes on investment liberalization.[48] Since 1995, formal discussions and negotiations were initiated at OECD, but the MAI was opposed by many developing countries.[49] In 1997 OECD held a ministerial meeting to discuss the MAI and had set a deadline of May 1998 for completion. However, after several negotiations, the Ministers still could not complete the MAI by the deadline and had to delay further talks. At the end of 1998, French withdrawal from the latest round of discussions and the failure to make progress made the future of the MAI at OECD doubtful.[50] It was believed that there was very little chance that the MAI negotiations would make further progress at OECD.[51]

2. Future Development – WTO and MAI

Since the demise of the MAI negotiations in the OECD, some supporters of the MAI model have stepped up efforts to move the negotiations to the WTO. In January 1999, the EU and Japan formally proposed that they would push the MAI negotiations into WTO to be completed by 2003.[52] However, because a WTO agreement would likely be much weaker than the draft that was emerging at OECD, the US has currently opposed the MAI negotiations moving to the WTO.[53] But if OECD process continues to falter, the US may accede to the

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Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States.

[46] See http://www.preamble.org/mai/oecd.html

[47] See http://www.preamble.org/mai/maihist.html

[48] *Ibid*.

[49] See http://www.preamble.org/mai/maiinwto.htm

[50] See http://www.preamble.org/mai/maifact.html

[51] See http://www.preamble.org/mai/maihist.html

[52] See http://www.citizen.org/pctrade/Shell-Game/Cover.htm

[53] See http://www.citizen.org/pctrade/Shell-Game/Wto.htm

change in venue.[54] Many developing countries and non-governmental organizations have stated that WTO is neither democratic nor transparent and that an MAI in the WTO would be more unacceptable than in the OECD.[55] There have been other attempts to suggest that future MAI negotiations may take place at the UNCTAD instead of OECD or WTO. UNCTAD is considered to be a better forum for developing countries, but critics still have charged that UNCTAD has tended to favor the interests of multinational corporations in recent years.[56]

Many developing country members objected to the WTO intervention in the area of investment policies. The WTO prohibitions on Trade Related Investment Measures (TRIMS) require its members to eliminate certain policies that impose conditions on foreign investment. TRIMS is a precursor to the MAI and eliminates requirements that foreign investors use local materials or suppliers when doing business in developing countries. Full-fledged investment rules in WTO would prevent its members from adopting policy requirements designed to ensure that local businesses, workers and citizens enjoy the benefits of foreign investment.[57] Unlike OECD that lacks the power to enforce regulations, WTO is an institution with dispute settlement instrument that addresses issues that many least-developed and developing countries worry about. Its appalling track record on the critical issues of labor rights, environmental and public health protection, and sovereignty and democratic accountability constitutes ample evidence that those countries will protest against an MAI negotiated under WTO auspices.[58] In addition to WTO and UNCTAD, there are many venues where they are simultaneously pursuing similar agendas such as the proposed Free Trade Area of the Americas (FTAA), the International Monetary Fund (IMF), the Transatlantic Economic Partnership (TEP), and the Asia-Pacific Economic Cooperation (APEC) forum.[59]

3. Main Provisions of MAI

The MAI is designed to ease the movement of capital—both money and production facilities—across international borders by limiting the power of

[54] See http://www.preamble.org/mai/maiinwto.htm

[55] OECD News Release: *Informal Consultations on International Investment*, 12/3/98 Agence France-Presse: *OECD reaffirms need for international investment rules*, Dec, 3, 1998 Consultation at the OECD; also see http://www.preamble.org/mai/dec98update.htm

[56] See *supra note* Opposition Building to MAI at the WTO; Nov. 9, 1998.

[57] See http://www.preamble.org/mai/maihist.html

[58] See http://www.citizen.org/pctrade/Shell-Game/Wto.htm

[59] See http://www.citizen.org/pctrade/Shell-Game/Cover.htm

governments to restrict and regulate foreign investment. The investment provisions of MAI are based on those of NAFTA. Unlike NAFTA that only applies to the U.S., Mexico and Canada, the MAI will amplify and apply its provisions worldwide.[60]

These basic rules of the MAI include[61]:

National Treatment—It requires countries to treat foreign investors and investments no less favorably than domestic ones. Under National Treatment, countries may not place special restrictions on what foreign investors can own, or maintain economic assistance programs that solely benefit domestic companies or require that a corporation hire a certain percentage of managers locally.[62]

Most Favored Nation—It requires governments to treat all foreign countries and all foreign investors the same with respect to regulatory laws. Laws prohibited by MFN would include economic sanctions that punish a country for human rights violations by preventing corporations from doing business there.[63]

Limitations on Performance Requirements—Performance requirements are laws that require investors to invest in particular channels of a local economy or to meet social or environmental goals in exchange for market access. Under the MAI, these requirements would be banned where they discriminate against foreign investors.[64]

A Ban on Uncompensated Expropriation of Assets—The MAI would require governments, when they deprive foreign investors of any portion of their property, to compensate the investors immediately and in full. Expropriation would be defined not just as the outright seizure of a property but would also include governmental actions "tantamount to expropriation." Thus, certain forms of regulation could be argued to be expropriation, potentially requiring governments to compensate investors for lost revenue.[65]

A Ban on Restrictions on the Repatriation of Profits or the Movement of Capital—Countries could not prevent an investor from moving profits from

[60] The Multilateral Agreement on Investment: A "Bill of Rights" for International Investors? See http://www.preamble.org/mai/4-pager.html

[61] See http://www.oecd.org/daf/cmis/mai/maitext.pdf

[62] The Multilateral Agreement on Investment: Content III. Treatment of Investors and Investments; The MAI Negotiating Text of OECD, 14 Feb. 1998; OECD, Main Features of the MAI 37; Working Group A, in OECD Documents 118; also see http://www.preamble.org/mai/keyprovs.html

[63] See MAI Working Group A, in OECD Documents 122.

[64] See NAFTA Art.1106, 1106.2 & 1106.4.

[65] See 1998 MAI: Content IV. Investment Protection; OECD Main Features of the MAI 20; Working Group C, in OECD Documents 138.

the operation or sale of a local enterprise to that investor's home country. Nor could countries delay or prohibit investors from moving any portion of their assets, including financial instruments like stocks or currency. It ensures that corporations and individuals can move their assets more easily. However, there are some exceptions that will be made in the case of national financial crises.[66]

Investor-to-State Dispute Resolution Mechanism—Under the MAI, it gives corporate or individual investors the right to sue local governments and seek monetary compensation in international court in the event that a law violates investor rights as established in the agreement. International investors would have the option to sue a country before an international tribunal rather than in the country's domestic courts. This investor-to-state dispute mechanism is a significant departure from previous international economic agreements like GATT, which allow only governments to bring complaints against other governments.[67]

Moreover, the MAI includes "Roll-back" and "Standstill" Provisions[68] that require nations to eliminate laws that violate MAI rules and to refrain from passing any such laws in the future. Currently, the MAI does not contain language on the responsibilities of corporations regarding treatment of employees, environmental protection, fair competition or other issues. There is discussion of including an existing OECD code of corporate responsibility in the MAI, but these provisions would be non-binding.[69]

4. Differences between MAI and Bilateral Investment Treaties

Bilateral Investment Treaties (BITs) are investment agreements negotiated by two countries to establish equal or preferential investment treatments for each other. Most BITs are signed by a developed and lesser-developed country. Unlike the BITs, the original MAI signatories are capital-rich countries and major exporters of international investment. Those countries can lever the dispute process to their advantage and challenge local governments' policies on health, safety and environment, etc. Under the MAI, the investor-state dispute mechanism will be exercised to challenge local regulatory regimes perceived by

[66] See OECD, Main Features of the MAI 12–15; Working Group C, Investment Protection; MAI Report; Working Group D, Dispute Settlement, in OECD Documents 155.

[67] See Content V. Dispute Settlement, 1998 MAI.

[68] See MAI Working Group B, New Issues, in OECD Documents 129.

[69] *Ibid*.

investors as onerous barriers to investment.[70] In addition, the MAI will apply to more economic sectors than the BITs. The MAI's provision on expropriation goes further than that of the BITs, and could force local governments to compensate investors for regulations that cost investors money.[71] The MAI will also ban a wider range of performance requirements than the BITs concern such as mandatory local job creation, mandatory joint ventures with local firms, and so on.[72] Based on these differences, several critics have focused on the MAI's negative potential impacts on state sovereignty over economic development.

5. *Influences of MAI in Global Economy*

a) *Arguments of MAI's Proponents*

The most prominent non-governmental proponents for the MAI are business groups. They claim that the agreement will provide needed protections for international investors against discrimination and expropriation, reduce the distortions and inefficiencies caused by excessive regulation, increase access to foreign markets on favorable terms and help businesses, consumers and workers. Increasing foreign direct investment will also benefit developing countries through the transfer of technology and improve the efficiency of the global economy.[73] The MAI will protect the rights of investors to free, equal and safe access to markets, and resolve the conflicts that are inevitable between governments and transnational corporations (TNCs).[74] Proponents also regard investment, like trade, as an engine of economic growth, employment, sustainable development and rising living standards in both developed and developing countries. The MAI would establish mutually beneficial international rules that would not inhibit the nondiscriminatory exercise of regulatory powers by governments, and ensures such exercise of regulatory powers would not amount to expropriation.[75]

b) *Arguments of MAI's Opponents*

There are, however, substantial concerns of opponents against the MAI from a large numbers of environmental, labor, consumer, and women's organiza-

[70] See http://www.preamble.org/mai/bits.html

[71] *Ibid*.

[72] *Ibid*.

[73] See http://www.preamble.org/mai/procon.html

[74] The Multilateral Agreement on Investment: A "Bill of Rights" for International Investors?; also see http://www.preamble.org/mai/4-pager.html

[75] See http://www.preamble.org/mai/maistat.html

tions.[76] They claim that the MAI will accelerate an economic and environmental "race to the bottom." This could hasten job flight from industrialized countries and increase the pressure on all countries to compete for investment capital by lowering wages, labor and living standards, as well as weakening environmental and consumer-safety standards. In addition, the MAI will allow investors to challenge legitimate regulatory safeguards that enjoy widespread public support but are viewed by investors as impediments to the free flow of capital.[77] The MAI provides legal protections for the rights of investors, but imposes no obligation for investors regarding labor rights, environmental standards, or anti-competitive business practices. The MAI allows investors to sue governments for compensation if they believe that any national, or local law violates their rights or poses a barrier to investment. Based on this point, it will undermine national sovereignty by requiring the roll-back of laws that violate MAI rules. Many laws and policies that could be challenged are designed to protect the public interest such as local economic development programs, laws designed to conserve valuable natural resources or land, community reinvestment laws, and bans on the production of dangerous products.[78]

Opponents have argued that the only real provision of the MAI is its nondiscriminatory basis for investors. Weighted toward business, it will cause difficulty for local governments to protect their environment, health, or safety of its citizens.[79] The OECD also has been strongly criticized for its failure to include developing countries in negotiations. Developing countries, led by India, Egypt, Pakistan and Malaysia, have expressed strong suspicions and oppositions toward the MAI agreement and its presumed bias towards developing countries.[80] The MAI would spell an end to boycotts and trade sanctions against countries or businesses violating environmental, labor, and human-rights standards.[81] The MAI would make it more difficult to implement

[76] See The Sinking of the MAI, *The Economist*, 1998; De Jonquieres, G.: Network Guerillas, *Financial Times*, 1998; and Drohan, M.: *How the Net Killed the MAI.* One World News Service, 1998.

[77] *Ibid*.

[78] *Ibid.*

[79] See Boulder opposes international investment treaty; Threat to local authority seen, *Denver Post*, 1998.

[80] Opposition Building to MAI at the WTO, *Bridges Weekly Trade News Digest,* Vol. 2, No. 43. 1998.

[81] See http://www.sierraclub.org/sierra/199807/LOL1.html; Trade Secrets, *Sierra Magazine,* 1998.

these kinds of self-reinforcing actions in the future.[82] The MAI would also make it more difficulty for governments to prevent or regulate international mega-mergers like BP Amoco or Daimler-Chrysler that will the interests of multinational corporations ahead of the public interest.[83]

Customarily, under international law, only countries have rights arising under the treaties they negotiate. The MAI creates rights that can be invoked directly by individuals or corporations, as a legitimate precedent for protecting very broad investor rights. A corporation need no longer persuade any government of the legitimacy of its complaint before seeking enforcement under an agreement to which it is not even a party. Such panels would operate under international law and according to procedures established for resolving international disputes arising under commercial contracts, but not by local legal principles and procedures. These MAI procedures are in many ways antithetical to the principles of open, participatory and democratic decision-making that are the hallmarks of contemporary legal systems.[84]

6. MAI and Telecommunications

Unlike the GATS on telecommunication under the WTO, the MAI lacks any related regulations on telecommunications. In addition, the MAI is a proposal under negotiation; therefore, its influences on telecommunication industries are not yet visible. Due to the importance of information and communication, most telecommunication industries are state-operated and monopolized in many developing countries. Many developing countries fear that by opening up their markets to competition and foreign investment without restrictions will cause the loss of control of this strategic industry. The MAI forbids governments to compel foreign corporations to transfer technology. This rule will deprive developing countries of an avenue to access technology in telecommunications and reap economic benefits from the foreign country's economic activities.[85] It will also constitute an obstacle for national telecommunication infrastructure and universal service in underdeveloped as well as developing countries. The

[82] Weisbrot, M.: A Corporate Bill of Rights? Distributed by Knight-Ridder/Tribune Media Services, 1998; also see http://www.preamble.org/mai/mwmai998.htm

[83] Weisbrot, M.: Megamergers and the MAI, *USA Today,* 1998; also see http://www.preamble.org/columns/weisbrot/megamergers.htm

[84] Shrybman, S.: The Rule of Law and Other Impediments to the MAI, *West Coast Environmental Law*, 1998.

[85] Lim, K.: *Arguments Against the Multinational Agreement on Investments*; also see http://darwin.bio.uci.edu/~sustain/issueguides/MAI/MAI-Con.html

dilemma is that, on the other hand, foreign investment in telecommunications generally will bring increased technological skills, funds and market competition that will benefit national telecommunications development. Adopting the MAI rules such as national treatment will provide an opportunity to benefit from an emerging "single market" for telecommunication services. Those countries not making commitments under the agreement may find difficulty in attracting foreign capital for infrastructure investment.[86] The rapid technological development in the field of communications has necessitated the development of global telecommunication marketplace.

Under the MAI, industries will have access to technologically advanced methods of manufacturing, which will be produced more efficiently and result in less waste.[87] Though, with a more open foreign investment regime in telecommunications, we risk possible damage to national telecommunication sovereignty and universal access for citizens. Telecommunications have substantial and essential influences to national security, social stability, and economic development and also encompass many industrial sectors. Considering the particular character of telecommunications, some regulations of the proposed MAI should be exempted. Performance requirements are essential safeguards in local laws for market access and foreign investment commitments to be effective. Rules pertaining to competitive safeguards, interconnection, universal service, licensing, the establishment of an independent regulator and the use of scarce resources like the radio spectrum are necessary for local telecommunications development.

IV. Conclusion

During the past few decades, foreign investment has rapidly increased among countries and has enhanced global economic growth. The evidence shows us that there was indeed a correlation between economic development and investment in telecommunications. FDI brings the promotion of economic growth, the obtainment of technology transfer and the creation of employment. Although FDI brings huge economic benefits, many countries are still only partially open to foreign investment. Developing countries fear that by opening up markets to competition and foreign investment without any restrictions,

[86] See *supra note*, Third Draft of the Secretary-General's Report to the Second World Telecommunication Policy Forum.

[87] Lam, J.: *Arguments In Favor of the Multilateral Agreement on Investments*; also see http://darwin.bio.uci.edu/~sustain/issueguides/MAI/MAI-Pro.html

they will lose control of their strategic industries. They have used performance requirements to control the categories and sizes of FDI, such as exporting requirements or technology transfer agreements. Balancing economic gains from FDI with the power to control national economic sovereignty is a dilemma with substantial history. To possibly solve many of the disputes between foreign investment and national sovereignty, a proposed MAI has been negotiated at the OECD.

The MAI is potentially a model of international investment agreement based on non-discrimination and is designed to make it easier for individual and corporate investors to move capital across international borders. The MAI will provide needed protection for international investors against discrimination and expropriation, and will reduce the distortions and inefficiencies caused by excessive regulations. Increasing foreign direct investment will benefit developing countries through technology transfer and economic gains. However, this study has shown that the MAI could hasten job flight from industrialized countries and could increase the pressure on all countries to compete for FDI capital with related fears pertaining to lower wages, lower living standards, and weakened environmental standards. The MAI also creates a new investor dispute mechanism that could undermine national sovereignty and challenge legitimate regulatory safeguards based on widespread public interests. Developing countries worry that a loosened environment for FDI through the MAI would supersede many of their developmental strategies and industrialization processes. Economic differences between developed and developing countries necessitate a level of sovereignty in developing countries that would allow them to attain their economic developmental plans and industrial strategies in parallel with the MAI's pro-investment environment.

The discussion throughout this article has also pointed out that a more open foreign investment environment does not always violate national economic sovereignty. Although developing countries need stronger control to guide their developmental directions and industrial strategies, such countries often lack necessary capital and technological skills to attain their industrialization goals. Foreign investment brings abundant capital, advanced technologies and huge economic profits, which can easily resolve developing countries' economic problems. However, a stable, transparent and non-discriminatory regulatory system is the best way to attract more foreign investment. Because of increased global economic competition, more and more developing countries already relax control over foreign investment and provide a more favorable investment environment and accompanying laws to foreign investors. Since there will be more countries competing to attract more foreign investment, a mandated investment agreement, i.e., the MAI, is ultimately not necessary for the global market. With neither transparency nor full-participation, the MAI may ruin many developing countries' economic profits and undercut their national sovereignty.

In sum, foreign direct investment is a necessary mechanism for developing countries to promote their economic growth; however, a uniform global investment instrument, the proposed MAI, is unsuitable to meet the different demands from different countries. With different developmental models and suffering different economic difficulties, underdeveloped and developing countries would be expected to strongly oppose such an international investment agreement. The proposed MAI is simply treated as an unfair attempt by developed countries that is designed to take advantage over developing countries. Moreover, the MAI forbids governments to require foreign corporations to transfer technology. This provision will deprive developing countries of an avenue for accessing technology in telecommunications that would reap economic benefits for the foreign country's economic development. Such a provision will also constitute an unnecessary obstacle for further local telecommunication infrastructure and universal service in developing countries. Considering the particular character of telecommunications, regulations of the proposed MAI should be exempted or set aside in favor of the needs of developing countries. A way to resolve this problem is to combine market competition, privatization and foreign investment in order to create an appropriate environment for telecommunications development that recognizes the special status of developing networks.

Additional investment in telecommunications from aboard should bring technology transfer, more abundant capital, and increased market competition, which should benefit national telecommunications development. By introducing foreign investment into developing countries, a workable local telecommunication infrastructure and universal access can be more easily reached. We have shown that increased foreign investment and privatization in telecommunication markets will result in substantial progress in meeting developing countries' basic telecommunications requirements. Of equal importance, telecommunications also have a substantial and essential influence on national security, social stability, economic development and many industrial sectors. In response, the opportunities for foreign investment in the telecommunication services sector historically have been limited and most developing countries have monopolistic and state-owned telecommunication carriers. An efficient trade and investment regime for telecommunication cooperation will have to recognize these two competing factors for a successful agreement between developing and developed countries.