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Comment

*181 DISPUTE SETTLEMENT AND THE OECD MULTILATERAL AGREEMENT ON INVESTMENT

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In 1985 Jeswald Salacuse called for the negotiation and conclusion of a multilateral investment framework to lend consistency and predictability to global investment. [FN1] For the past several years the Organization for Economic Cooperation and Development ("OECD") [FN2] has been considering the feasibility of developing a new multilateral investment framework. Although the OECD has actively promoted the liberalization of flows of foreign investment since its inception, its member states have never concluded a legally binding multilateral agreement for the protection of foreign investment. Today, the OECD has responded to the needs of modern investors, and its member countries have initiated the negotiation of the Multilateral Agreement *182 on Investment ("MAI"). [FN3]

The eventual conclusion of the MAI is of particular importance to the United States given the extent to which its nationals are participants in foreign investment. According to recent estimates, the United States is the world's largest source [FN4] of foreign direct investment. [FN5] In 1989 the total world-wide value of foreign direct *183 investment was estimated to be $1.5 trillion. [FN6] Other OECD nations have a similar stake in the conclusion of the MAI. Outflows of investment from the five major sources of foreign investment--France, Germany, Japan, the United Kingdom, and the United States--increased from $32 billion in the early 1980s to an estimated $146 billion in 1993. [FN7] Without a doubt, this massive upsurge in foreign investment, the growth of multinational corporations and the emergence of developing markets have caused a fundamental transformation in international commerce. [FN8]

Today's world--where a Los Angeles museum director finds it less expensive to have marble quarried in India, sculpted in Japan, then shipped to Los Angeles than to purchase domestic marble from Minnesota--is radically different from a mere fifty years ago. [FN9] The financial incentive to lower costs even further by owning the mining equipment in India, paying the sculptors' salaries in Japan and contracting with the freighters for just-in-time delivery, makes the last decade's increase in foreign investment hardly surprising. [FN10] We should expect this trend to continue unabated so long as expanding markets create the potential for lucrative profits, and investors can be confident their investments are secure.

However, shifts in political climate, [FN11] armed conflict [FN12] and legal or *184 regulatory change [FN13] often spell disaster for foreign investors. Such uncertainty has led governments to seek mutual commitments to ensure the

security of their citizens' investments. In the latter half of the twentieth century, the United States and many European governments recognized the need for specialized legal regimes for the protection of foreign investment and began negotiating bilateral investment agreements with developing nations. [FN14] Since the 1960s over eight hundred bilateral investment agreements have been signed and ratified by various nations throughout the globe. [FN15] The duties and obligations created by each of these agreements are as varied as the languages in which they are negotiated, hence the need for a single, comprehensive regime for the protection of foreign investment.

This Comment argues that such a regime must include a binding dispute resolution mechanism capable of handling both investor-state and state-state investment disputes. Governments have been traditionally wary about submitting to the compulsory jurisdiction of international tribunals, and the United States and other OECD member states are likely to take this position when negotiating the MAI. Some of the concern is political and some is legal, but most arises out of a widespread fear of the erosion of national sovereignty.

I first examine the international agreements which currently address the subject of foreign investment, with an emphasis on how each provides for dispute settlement. Second, I outline the international legal remedies available under customary international ***185** law potentially available in the event of a breach of the MAI. Finally, I propose a dispute settlement mechanism for the MAI which borrows from the strengths, and avoids the weaknesses, of those already in existence.

I. Current International investment Regimes

A. Friendship, Commerce and Navigation Treaties

At the founding of the United States, the principal legal instrument through which the United States established commercial relations with other nations was the Friendship, Commerce and Navigation Treaty ("FCN"). [FN16] The earliest FCNs were concerned primarily with trade and shipping rights, but they included general obligations to protect the property of the nationals of the other party. [FN17] Some early FCNs also included provisions which addressed the subjects of expropriation [FN18] and repatriation of earnings. [FN19] The purpose of the FCN, in the words of the International Court of Justice ("ICJ"), was "to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual ***186** undertakings to ensure the protection and security of their nationals in each other's territory...." [FN20] Unfortunately, the early FCNs fail to provide adequately for the resolution of disputes arising under the treaty. The primary method of dispute resolution contemplated by these agreements is a mere demand for restitution prior to taking reprisals [FN21] or declaring war on the other party. [FN22]

As foreign commercial relations expanded in the 1930s and 1940s, the United States began to see the FCN as the primary treaty instrument for the protection of foreign investment. [FN23] As such, the FCNs negotiated during the post-World War II era provided more comprehensive protections for foreign investment. For example, modern FCNs afford nationals and business entities of each state national and most-favored-nation ("MFN") treatment with respect to engaging in a broader range of commercial and non-commercial activities. They

guarantee prompt, adequate and effective compensation for the expropriation of property and limit the ability of each party to impose restrictions on currency transfers. [FN24] Significantly, modern FCNs also include a pre-existing legal remedy for breaches of the treaty's provisions. Any dispute between the parties as to the application of the treaty, if not settled through diplomacy, is to be