

ESTUDIOS



# THE ROLE OF THE OECD IN THE ELABORATION OF MULTILATERAL NORMS CONCERNING FOREIGN DIRECT INVESTMENTS: A SHARP CONTRAST BETWEEN TWO DIFFERENT APPROACHES

*El rol de la OCDE en la elaboración de normas multilaterales sobre Inversiones Extranjeras Directas: un contraste agudo entre dos aproximaciones diferentes*

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**ABSTRACT:** This paper focuses on the OECD role with reference to the elaboration of multilateral norms concerning the discipline of Foreign Direct Investments. In particular, by distinguishing between a promotional approach and regulatory one, it aims to analyze how the OECD activities fulfill the need for balancing the economic rights of the private investors with the host State's public interests. In particular, while

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showing how the previous OECD attempts to elaborate a Multilateral Agreement on Investment (forward MAI) were primarily concerned with the promotion of developed countries' strategic economic sectors, it finds that the Guidelines for Multinational Enterprises also take into consideration the protection of numerous "*public goods*". However, the gap which remains in the discipline of international investments could be filled by these Guidelines only through their incorporation into binding legal instruments.

**KEY WORDS:** International investments – Multilateral Agreement on Investment – OECD Guidelines for Multinational Enterprises – regulatory approach – promotional approach

**RESUMEN:** Este artículo versa sobre el rol de la OCDE en lo relativo a la elaboración de normas multilaterales sobre la regulación de Inversiones Extranjeras Directas. Particularmente, al distinguir entre una aproximación promocional y una regulatoria, pretende analizar cómo la actuación de la OCDE cumple con la necesidad de ponderar los derechos económicos de los inversores privados con los intereses públicos del Estado anfitrión. Particularmente, al tiempo que muestra cómo los intentos anteriores de la OCDE de elaborar un Acuerdo Multilateral sobre Inversión se preocupaban principalmente de la promoción de sectores económicos estratégicos de países desarrollados, descubre que las Directrices para Empresas Multinacionales también toman en consideración la protección de numerosos "*bienes públicos*". Sin embargo, el vacío que subsiste en la regulación de inversiones internacionales puede ser cubierto por estas Directrices sólo a través de su incorporación en instrumentos jurídicos vinculantes.

**PALABRAS CLAVE:** Inversiones internacionales – Acuerdo Multilateral sobre Inversión – Directrices de la OCDE para Empresas Multinacionales – aproximación reguladora – aproximación promocional

## INTRODUCTION

Over the past few decades, there has been an increasing interest in the implications that result from an unbalanced and sectorial regulation of international investments.<sup>1</sup> It has been widely recognized that the contribution of foreign companies, in terms of capital, infrastructure and know-how, can be an important source for the socioeconomic progress of the developing and least

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<sup>1</sup> ECONOMOU *et al.* (2008 – 2009) pp. 3 – 33.

developed countries, once it is channelled into an adequate regulatory framework.<sup>2</sup> However, given the legal and institutional deficiencies of several low per-capita economies, frequently the flux of foreign capital is not regulated in line with the achievement of national objectives. It is indeed not a coincidence that multinational companies often decide to invest in those countries for so-called cost saving reasons.

In the absence of adequate national legislations, the International law should ensure a fair and satisfactory balancing of the interests concerned, by promoting, along with a greater liberalization and economic integration, standards for the protection of the public interests. However, after the failure to conclude a Multilateral Agreement on Investment (MAI) within the Organisation for Economic Co-operation and Development (OECD), there is currently no adequate way of regulating Foreign Direct Investments (FDIs) at multilateral level. Therefore, the fragmentation of the discipline is accompanied by both an excessive focus on promoting cross-border investments and a limited ability to protect public goods such as natural heritage, cultural diversity and democracy. In other words, the promotional approach prevails over the regulatory one.

Furthermore, the financial crisis of 2007 – 2008 frustrated any hope as to the possibility that the Doha Development Round would be concluded by the end of the past decade, as well as any confidence that the FDIs would feature on the negotiating agenda, following the decision to abandon it in 2004.<sup>3</sup> Thus, pending future developments, only two World Trade Organization (WTO) Agreements are interested in the issue of FDIs: the Agreement regarding the Trade-Related Investment Measures (TRIMs) and the General Agreement on Trade in Service (GATS). These latter, however, address the issue only with reference to those aspects of investments related to trade.

If, in the short term, the possibility of extending the mandate of the WTO has vanished, the economic recovery has led to a return of investment flows to pre-crisis levels between 2010 and 2011, registering a sharp increase in transactions between emerging countries.<sup>4</sup> Emerging economies, especially China and

<sup>2</sup> AAKEN (2008) pp. 91 – 130, AGUILAR y OYARZÚN (2011) pp. 579 – 605, AGUILAR y PARKER (2003) pp. 365 – 407, COSBEY *et al* (2004) p. 46, DOLZER y SCHREUER (2012) p. 46, DUPUY (2009) pp. 45 – 63, LIBERTI (2007) pp. 791 – 852, FRY (2007 – 2008) pp. 77 – 149.

<sup>3</sup> World Trade Organization (WTO), *Doha Work Programme, Relationship between Trade and Investment* (2004, WT/L/579), in which it has been stated that: “(...) the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20 – 22, 23 – 25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round (...)”.

<sup>4</sup> UNCTAD (2011) 250 p.

India, are showing a greater resilience than their industrialized counterparts.<sup>5</sup> This is allowing an acceleration of the phenomenon, already in progress for several years, whereby Asian investors are slowly replacing those coming from the United States and the European Union (EU) in relevant economic areas.<sup>6</sup> While it can be assumed that this activism has positive implications for developing and least developed countries' economic growth, it can also be seen as a major risk for the development of a balanced discipline of international investments. In fact, despite the growing interest of the OECD countries on the negative effects of the establishment of multinational enterprises in the territory of countries whose legal apparatus are characterized by an evident legislation weakness, it seems that Asian countries are not willing to follow these new trends. Today, therefore, OECD countries are facing with a double challenge: ensuring that the discipline of international investment addresses the protection of public interests and, at the same time, dealing with the competition coming mainly from China.

## I. THE MULTILATERAL AGREEMENT ON INVESTMENT

Since the late '60s, following a period in which it seemed that the tensions between industrialized countries and developing countries had reached a point of no return, there has been a phase in which the rapid expansion of FDIs has been followed by attempts to develop and codify provisions intended to regulate FDIs access and treatment.<sup>7</sup> The OECD has been a pioneer in addressing this issue.<sup>8</sup> Already in 1961, it created the Codes of Liberalization of Capital Movements and Current Invisible Operations, in order to remove the controls over bank accounts. Although the Codes, and the associated Guidelines, were significant in promoting more open international capital markets, they represented however a minimum result in terms of the main objective of the Organization: to bring unity to the myriad of Bilateral Investment Agreements (BITs) governing the issue of cross-border investments.<sup>9</sup>

In May 1995, the OECD launched the negotiations on the adoption of a multilateral agreement on FDIs. This event was undoubtedly a unique opportunity for the formation of general rules designed to regulate both the phase of liberalization and the protection of international investments. The MAI, in theory, would have to raise the standards of protection for foreign investors through two key principles: i) national treatment and, ii) Most Favored Nation

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<sup>5</sup> AYHAN y PRASAD (2010) pp. 6 – 10.

<sup>6</sup> ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, *Foreign Direct Investment in Latin America and the Caribbean*, 2011 y UNDP (2007).

<sup>7</sup> GEIGER (1998) pp. 467 *et seq.*

<sup>8</sup> JUILLARD (1998) pp. 477 – 484.

<sup>9</sup> CANNER (1998) pp. 657 – 682.

(MFN). The negotiations were held between 1995 and 1998 but never exceeded the planning stage. There were concerns, for example, from France,<sup>10</sup> as to the possible negative effects that the MAI would have on the access and treatment of foreign investments in sectors considered strategic for the transalpine economy, such as the audiovisual one. Equally, the project raised concerns from several OECD non-member countries, given its ability to undermine their prospect of socio-economic development, considering also that they did not play any role in the negotiation phase.<sup>11</sup>

### **1. Purpose and discipline**

The purpose of the MAI was very ambitious: create a multilateral legal basis for the entire discipline of international investments. The Agreement was built along the lines of the US Model of BITs, as based on the obligation of non-discrimination.<sup>12</sup> In this sense, while the host State was not required to accept the foreign investor on an unconditional basis, it was obliged to regulate its access and establishment in a non-discriminatory manner with respect to both domestic and foreign investors.<sup>13</sup> Thus, unlike many other BITs, the application of the provisions of national treatment and MFN were not contingent upon the effective establishment of the foreign investor in the host country, working instead from the market access phase. This was in order to ensure an even higher level of protection for the foreign enterprises. Moreover, if the WTO Agreements ensured a “bottom up” protection (only the areas specifically mentioned fall within the scope of the Agreements), the MAI approach was “top down”. This meant that the Agreement, by definition, applied to all economic areas, unless through a specific reserve the Contracting Party could suspend its application to a given branch of the national economy. The MAI was then a horizontal Agreement, in contrast with the partial approach used in the WTO.

A second issue concerned with the fact that the drafters of the MAI welcomed a definition of investment that went far beyond the traditional concept of FDIs (establishment of branches and subsidiaries, acquisition of permanent interests in local companies, purchase of material goods), to include also financial investments<sup>14</sup>. So it was much easier for companies operating abroad to be included among the beneficiaries of the MAI protection.<sup>15</sup>

<sup>10</sup> LANG J., *“L’ami, c’est l’ennemi”*, *Le Monde*, 10<sup>th</sup> February 1998.

<sup>11</sup> ZDENEK (1998) pp. 4 *et seq.*

<sup>12</sup> VANDEVELDE (1992).

<sup>13</sup> VALENTI (2009) pp. 22 *et seq.*

<sup>14</sup> STUMBERG (1998) pp. 491 – 598.

<sup>15</sup> NASCIBENE (1984) 591 p.

Coming to the expropriation and compensation rules, according to the MAI the expropriation (or any other measures having equivalent effects) was allowed only if: i) needed for safeguarding a public interest, ii) applied in a non-discriminatory way, iii) followed by the payment of a prompt, adequate and effective compensation, iv) carried out in accordance with the rule of the due process of law. In addition, art. 2, Title IV, specified the meaning of *prompt, adequate and effective* and *due process of law*. First: i) *Prompt* indicated without delay, ii) *Adequate* meant that compensation should be equivalent to the market value of the property expropriated, referring to the time immediately preceding the act of expropriation, iii) *Effective* meant that compensation should be fully realizable and freely transferable. Second, the concept of *due process* should be interpreted as widely as possible, in order to guarantee the investor to effectively enforce its procedural rights without discrimination. Given the above, it was clear that, even during the pathological relationships between the host State and foreign investor, the MAI was inclined towards the full protection of the private rights by: (i) clarifying the conditions under which a confiscatory measure could be considered as lawful (effectively limiting the freedom of the host State in certain pre-determined circumstances); (ii) embracing the famous Cordell Hull formula,<sup>16</sup> as regards the quantum of the compensation; (iii) clarifying the procedural rights of the foreign investor.

As far as the regime of exceptions under the MAI is concerned, the Contracting Parties could limit the applicability of the National treatment and MFN principles only for reasons of national security or maintenance of international peace.<sup>17</sup> The introduction of a third category of exceptions was also discussed (the so-called “cultural exception”, designed to protect linguistic and cultural diversity). However, in order to avoid an excessive use of this exceptional regime, even before the negotiations broke down, it was decided not to include the cultural exception in the text of the Treaty. Moreover, demonstrating the will to provide a general application of the principles of non-discrimination, the exceptions were operable only where it was necessary “(...) to prevent any Contracting Party from taking any action which it considers necessary for the protection of its essential security interests; to require any Contracting Party to furnish or allow access to any information the disclosure of which it considers contrary to its essential security interests; to prevent any Contracting Party from

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<sup>16</sup> From the name of the United States Secretary of State Cordell Hull, who stated that, following the adoption by Mexico of a general program of nationalizations and expropriations in 1936 and according to the general international law, in case of expropriation the State would have paid an “adequate, effective and prompt” compensation. See COSTAMAGNA (2008) pp. 245 – 281.

<sup>17</sup> WALLACE y BAILEY (1998) pp. 615 et seq.

*taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security (...)*".

Finally, pursuant to article 90, the Parties could grant either to local or foreign businesses a more favorable treatment than their competitors, in violation of the principles of MFN and national treatment, only if the measure had been previously agreed and, consequently, inserted in an *ad hoc* Annex.

## **2. Brief remarks**

The failure of the MAI negotiations demonstrates the difficulty in reconciling the needs of different Contracting Parties in a highly sensitive area such as foreign investments. This is mainly because the economic and commercial relationships between the investor and the host State are characterized by a medium-long term duration, affecting in a durable manner the economic, social and political environment of the country hosting the investment. It is clear that the needs of developing and least developed countries had been generally neglected in the OECD negotiations. Apart from the Preamble, in which the parties expressly recognized the importance of investment as regards i) the development of their economies, ii) the efficient use of the economic resources, iii) the creation of jobs, iv) the improvement of the living standards, the MAI essentially reflected the American approach,<sup>18</sup> aimed at extending the principles of non-discrimination at all different stages of investment. It is not an accident that, during the negotiation phase, it was strongly opposed by several Non-Governmental Organizations (NGOs).<sup>19</sup> Furthermore, the MAI had shown all its regulatory deficiencies, given the absence of any reference to the behavior of multinational corporations in foreign territories. For instance, the Agreement lacked any mention to other international instruments relating to workers' rights, using a general language, without specific legal value. By the same token, the MAI did contain neither environmental standards nor any reference to the concept of Corporate Social Responsibility. Moreover, thanks to the inclusion of financial investments within the scope of the Agreement, if it were actually entered into force, it would have increased the risk of "sealing" for the economies involved.

Although the MAI represented a missed opportunity to develop a multi-lateral agreement governing the entire subject of international investments, for the above described reasons, it is believed that its entry into force would create more hindrances than enhancements for countries' development and public

<sup>18</sup> SCHOLZ (1998) pp. 485 *et seq.*

<sup>19</sup> GRAHAM (1998) pp. 599 – 614, TIELEMAN (2000) pp. 6 – 7.

interest protection. As stated by influential doctrine, its only goal was to ensure a world “safe for foreign investments”.<sup>20</sup>

## II. THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

The OECD has been concerned with the issue of international investments not only as regards the mere promotion of FDIs, acting as a forum for the MAI negotiations, but also with reference to the regulation of the conduct of multinational enterprises abroad. Here we focus on the so called Guidelines for Multinational Enterprises. Adopted in June 1976, there were recommendations, which fall within negotiations between the governments of the OECD member States, having the ultimate goal of directing multinational enterprises to respect certain standards. From a structural point of view, the text is divided into two sections. The first concerns the so-called substantial part, characterized by a list of principles governing the conduct of multinational enterprises. The second focuses on the Implementation Procedures of the Guidelines.

### 1. *Substantial part*

The broad perspective of the Guidelines, where they attempt to fill the gaps of the multilateral regulation of FDIs, is evident in the existence of chapters relating to a series of topics, ranging from the protection of human rights and the environment<sup>21</sup> to industrial relations<sup>22</sup> and consumer rights. The substantial part, in fact, is divided into the following subsections: i) Concepts and Principles, ii) General Policies, iii) Disclosure, iv) Human Rights, v) Employment and Industrial Relations, vi) Environment, vii) Combating Bribery, Extortion and Solicitation Bribe, viii) Consumer Interests, ix) Science and Technology, x) Competition, xi) Taxation.

Firstly, the text recognizes, in the chapter on Concepts and Principles, the separate legal personality of multinational corporations, by analyzing them not as a single entity, but as a set of companies belonging to parent enterprises, usually instituted in different States. The text aims to overcome the legal obstacles related to both the lack of a single legal personality under national law and the absence of legal personality under International law, in order to better reflect the existing financial and personal ties among the various companies. This approach is confirmed in the chapter on General Policies, which provide some standards, particularly in areas where are already pre-existing forms of coordination amid Member States. Although the Guidelines view the States as

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<sup>20</sup> SCHNEIDERMAN (2000) pp. 757 – 787.

<sup>21</sup> VENDZULES (2010) pp. 451 – 489, MORGERA (2006) pp. 751 – 777.

<sup>22</sup> ULBRICH (2004) pp. 366 – 384, CAMPBELL (1983).

the primary responsible for the implementation of the standards of conduct, they clarify that this circumstance must not be interpreted as lowering the sense of responsibility of multinational enterprises.

On the contrary, according to text of the Guidelines, enterprises “(...) should be viewed as partners with government in the development and use of both voluntary and regulatory approaches (of which the Guidelines are one element) to policies affecting them. There should not be any contradiction between the activity of multinational enterprises (MNEs) and sustainable development, and the Guidelines are meant to foster complementarities in this regard (...)”. This approach is confirmed by the principles governing the liability of corporate executives. The Guidelines recommend, in fact, that the signatory States adopt legislation to clarify the terms that create a link between the positions held by managing directors and the conduct of the company. The purpose of this provision is to encourage a regime in which the administrators are accountable to third parties for the acts carried out by the company, while reinforcing the well-known concept of Corporate Social Responsibility.<sup>23</sup> These principles, which have the potential to imply a radical change in the corporate law framework of the signatory States, have the ultimate goal to enable and facilitate a control over the activities of international companies. Specifically, they are functional to the respect and implementation of the standards contained in the Guidelines.

Not surprisingly, even in those chapters concerning compliance with environmental parameters (as well as human rights and industrial relations), a special emphasis is placed on the fact that companies, as well as States, are required to comply with the standards contained in text of the Guidelines. Equally, the chapter on human rights, while asserting that States “(...) have the duty to protect human rights (...)”, it stresses that companies “(...) regardless of their size, sector, operational context, ownership and structure, should respect human rights wherever they operate (...)”.

Accordingly, if a State fails to enforce national laws or implement international standards on human rights, this does not imply that the expectations for multinational companies to respect human rights are lowered. Even in those countries whose domestic laws are particularly weak in terms of human rights, the Guidelines expressly provide that companies have to make reference to international legal instruments “(...) expressed in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social

<sup>23</sup> OECD (2001) pp. 29 – 77.

*and Cultural Rights, and to the principles concerning fundamental rights set out in the 1998 International Labour Organization Declaration on Fundamental Principles and Rights at Work (...)*".

To that extent, Paragraph V is of particular interest because it requires multinational companies to undertake a due diligence assessment of the impact of their conduct on human rights. Upon completion of this process, companies should not pursue activities contrary to the results of the due diligence assessment. In this sense, therefore, companies are not only required to comply with the standards contained in the Guidelines, but also to engage in purposeful actions, becoming the main protagonists of the text of the recommendations.

## **2. Procedural part**

The second section concerns the so-called Guidelines control procedure (better known as follow-up). In accordance with this section, States are required to exhaust the procedures set out in the Guidelines, without being bound to their results. The procedure is based on the dialogue between companies and national or supranational bodies. In particular, Member States should establish National Contact Points (NCP), through which the behavior of the firms can be monitored.

The NCPs are required, in particular, to collect information and report to OECD Investment Committee on the outcome of their activities. In carrying out their activities, the NCP must be properly assisted by their governments, which are expected to follow four criteria: visibility, accessibility, transparency and accountability. The OECD Investment Committee, for its part, has to express its opinion on: i) the activities conducted by the NCP, ii) the interpretation and application of the Guidelines.

Despite the limitations related to the intrinsic non-binding character of the Guidelines (which precludes the Committee from acting as a court of law or semi-judicial body) what allows watching this soft law instruments as a possible starting point for the future development of binding codes is the above-described control procedure. The Guidelines also appear to be of principal importance in the light of the introduction of a series of innovative concepts in the field of international investments. Yet the fact remains that only by translating them into conventional norms they can aspire to fill the gap that remains in the rules governing international investments.<sup>24</sup>

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<sup>24</sup> OECD (2006) 45 p.

## CONCLUSIONS

The article has documented the clear asymmetry existing at multilateral level between the promotion and protection of private interests of the foreign investor, on the one hand, and protection of the host State's public interests, on the other. Multinational companies are protected by binding legal instruments, considering that countries usually conclude investment treaties requiring host States to respect the MFN and national treatment principles, while the public interests of the community are sheltered only through non-binding measures. It is doubtless that this disproportion has arisen from a vision of economic and trade relations based on the idea of the "free market without rules". However, it is becoming abundantly evident that the 2007 – 2008 financial crises as well as the subsequent sovereign debt crisis have put an end to this idea of doing business.

The influx of capitals and the conspicuous presence of foreign investors have been discovered important for the socio-economic development of recipient countries only with reference to those States which have been able to direct these capitals towards the achievement of national objectives. At this point, it is crucial to align law with economy to ensure that, in the future, the wealth of opportunities offered by globalization are shared equally amidst all parties involved. Without further progress in this field, the contribution of FDIs to the socioeconomic growth of the developing and least developed countries will remain elusive. Pressing forward with the adoption of rules concerning the protection of public goods is becoming essential for the achievement of real social and democratic reforms. It could also represent a tool for the improvement of the political and economic role of the OECD countries in the international arena.

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