

THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT'S ROLE IN INTERNATIONAL LAW†

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When one thinks of international organizations and lawmaking, the Organisation for Economic Co-operation and Development (OECD) rarely merits a mention. It certainly pales in comparison to bodies in the U.N. system: the International Labor Organization, and the World Trade Organization (WTO). For its first fifty years, the OECD has remained a remarkably low-profile institution. Even among international lawyers, few know what the organization really does. Even those who know of the OECD tend to focus on its well-known activities in economic spheres, rarely thinking of its role in relation to social or environmental issues.¹ As a result, it should come as no surprise that there has been little political science or legal scholarship on the OECD as an institution in any context.

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1. See generally, e.g., Andrew Moravcsik, *Disciplining Trade Finance: The OECD Export Credit Arrangement*, 43 INT'L ORG. 173 (1989). This study of the OECD Export Credit Arrangement provides an excellent analysis of negotiations conducted at the OECD, but the focus is on regime formation and maintenance rather than on the OECD itself. See generally *id.*

focusing on the OECD is therefore long overdue, for the OECD has played, and continues to play, an important and largely unrecognized role as a lawmaking body. Professor Anne-Marie Slaughter, for example, has predicted that, in stark contrast to the United Nations, “[t]he next generation of international institutions is . . . likely to look more like the Basle Committee [, composed of twelve central bank governors], or, more formally, the Organization for Economic Cooperation and Development, dedicated to providing a forum for transnational problem-solving and the harmonization of national law.”²

The OECD occupies a unique space in the international lawmaking field, in large part because it was not established with lawmaking as a priority. First established to administer the Marshall Fund for the reconstruction of Europe, the OECD’s founding treaty mandated the organization to promote policies designed:

- (a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy;
- (b) to contribute to sound economic expansion in Member as well as non-Member countries in the process of economic development; and
- (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.³

Its primary purpose was economic rather than legislative. To that end, the OECD plays a range of roles.

First and foremost, the OECD is a research and networking organization. By virtue of its restricted membership, the OECD in many respects acts as an exclusive club whose members produce two-thirds of the world’s goods and services. The OECD provides a private setting for wealthy industrialized governments to share experiences, identify issues of common concern, and coordinate domestic and international policies. In simple terms, the OECD’s range of standing inter-governmental committees serve as useful talking shops for countries to share experiences, learning from one another’s successes and challenges. While not voiced openly, the

2. James Salzman & Julio Bacio Terracino, *Labor Rights, Globalization and Institutions: The Role and Influence of the Organisation for Economic Cooperation and Development*, in SOCIAL ISSUES, GLOBALISATION AND INTERNATIONAL INSTITUTIONS 312, 313 (Virginia A. Leary & Daniel Warner eds., 2006) (citations omitted).

3. *Id.* at 316 (citations omitted).

closed-door meetings of the OECD provide an important alternative forum to what is often viewed as the developing country-dominated and politicized U.N. system. The OECD occupies a unique position in the constellation of international organizations, with membership broader than the European Union, the Nordic Council, or the North American Free Trade Agreement (NAFTA), yet much more restrictive than the United Nations or WTO, and with topic coverage as broad as any international organization. As a result, the OECD provides a restricted forum on virtually unrestricted topics.

The OECD also acts as a high-powered research institution. Its more than 2000 employees (many of whom are economists) collect data, monitor trends, forecast economic developments, and develop policy options for consideration by member countries. Its Economic Outlook series, for example, forecasts macroeconomic trends over the next two years such as gross domestic product, employment, account balances, and interest rates, each of which is followed closely by the global financial media. The OECD's ability to gather and synthesize data on members' policy initiatives and results provides a wealth of insight concerning which types of policies work best in particular settings. Unlike sector-specific intergovernmental organizations (IGOs) such as the United Nations Environment Program (UNEP), the United Nations Food and Agriculture Program, the International Monetary Organization and others, the OECD's research occurs in virtually all fields of interest to governments—including trade, environment, agriculture, technology, taxation, education, foreign assistance, and employment. The result is over 250 books published annually, in addition to many reports that are not published.⁴

Importantly, the OECD's research is purposely conducted on behalf of member country government officials, who direct from the outset the scope of work with their own domestic policy and legal development concerns in mind. The research agendas can be strategic, with domestic agency officials attempting to use the OECD as a fulcrum to leverage policies in their capitals. Such transgovernmental coalition building "takes place when sub-units build coalitions with like-minded agencies from other governments against elements of their own administrative structures."⁵ Because its organization is so decentralized, with each specialty directorate's work plan set by the respective national ministers (environment

4. *Id.* at 317–18 (citations and footnotes omitted).

5. *Id.* at 319 (citations and footnotes omitted).

ministers establishing the agenda of the Environment Directorate, trade ministers determining the projects of the Trade Directorate, etc.), the OECD offers enormous flexibility and speed compared to other international institutions.

In addition to its primary role of convening and research, the OECD has in a number of instances directed the negotiation and adoption of international legal instruments. Article 5 of the OECD's Convention provides for member countries, through the Council of Ministers, to take three types of legal action—recommendations, decisions, and agreements with other governmental bodies.

Recommendations are nonbinding agreements that generally represent policy advice with a strong base of support.⁶ For example, in response to the increasing use of information technology to create new avenues for offshore investment for the purposes of tax avoidance and evasion, the OECD Council adopted two recommendations to improve exchange of information between countries advocating the use of tax identification numbers and a standard magnetic format for automatic exchange of information.⁷ Member countries generally use recommendations either as a means to influence domestic policy development, arguing in their respective capitals that the OECD has endorsed a particular approach, or as a precursor to a decision.

Decisions are legally binding on member countries. Not surprisingly, adoption of decisions is less frequent than adoption of recommendations and the negotiations are followed much more closely by member countries.⁸ In 1972, for example, the OECD adopted a decision confirming the importance of the Polluter-Pays Principle.⁹ The Polluter-Pays principle is “a fundamental principle for allocating costs of pollution prevention and control measures introduced by the public authorities in Member countries,” that states that the polluter should bear the expenses of its impacts.¹⁰

6. *Id.* at 319 (citations and footnotes omitted).

7. See generally Org. for Econ. Co-operation & Dev. [OECD], *Recommendation of the Council of the OECD on the Use of the Revised OECD Standard Magnetic Format for Automatic Exchange of Information*, OECD Doc. C(97)30/FINAL (July 10, 1997); OECD, *Recommendation of the Council on the Use of Tax Identification Numbers in an International Context*, OECD Doc. C(97)29/FINAL (May 23, 1997).

8. Salzman & Terracino, *supra* note 2, at 321 (footnotes omitted).

9. See generally OECD, *Recommendation of the Council on Guiding Principles Concerning International Economic Aspect of Environmental Policies*, OECD Doc. C(72)128, Annex, ¶¶ 1–5 (May 26, 1972) [hereinafter *Guiding Principles*].

10. OECD, *Recommendation of the Council on the Implementation of the Polluter-Pays Principle*, OECD Doc. C(74)(223), art. I (Nov. 14, 1974); see also *Guiding Principles*, *supra*

Now accepted in environmental economics as the straightforward requirement to internalize negative externalities,¹¹ the Polluter-Pays Principle was tremendously important in shaping early environmental pollution laws.

Article 6 of the OECD Convention requires consensus for adoption of recommendations and decisions, though members may abstain and thereby enter the equivalent of a reservation. The practice of closing meetings to the public and the consensus requirement for recommendations and decisions eliminates much of the acrimony and political grandstanding in other fora such as the U.N. General Assembly. If proponents of a recommendation or decision face concerted opposition from even a few countries, a vote will not be taken until significant negotiation has produced a text acceptable to all the member countries. Despite the fact that decisions are binding, it is exceedingly rare for any OECD decision to provide sanctions for noncompliance.

While limited in number, the OECD's drafting of international agreements has played a significant role in crafting the emerging architecture of global governance. The agreements negotiated at the OECD, for example, reduce the importance of tax havens, prohibit bribery in international business transactions, regulate the transfrontier movement of hazardous wastes, revise codes of conduct for corporate governance, and create multilateral rules for foreign direct investment. In all of these cases, the agreements set in place multilateral rules where weak or nonexistent international limits operated before.¹²

The next Part provides a series of case studies, providing detailed examples of how the OECD has developed international law.

I. HAZARDOUS WASTE TRADE

In the 1980s, a high-profile series of illegal waste dumping riveted the public's attention. The nature of these toxic shipments was fraudulently concealed from developing countries. The infamous Koko case in 1988 came to represent one of the worst examples of transboundary movements of hazardous waste.¹³ In return for

note 9, ¶¶ 1–5.

11. See generally, e.g., OECD, *The Polluter-Pays Principle as It Relates to International Trade*, OECD Doc. COM/ENV/TD(2001)44/FINAL (Dec. 23, 2002).

12. Salzman & Terracino, *supra* note 2, at 322–23 (footnotes omitted).

13. For a case study of the Koko incident, see Alessandra M. Poropot et al., *Nigeria Waste Imports from Italy*, TED CASE STUDIES (Jan. 1993), <http://www1.american.edu/ted/nigeria.htm>.

paying \$100 monthly rent to a Nigerian national for use of his farmland, five ships transported 18,000 barrels of Italian hazardous waste to the small river town of Koko, Nigeria.¹⁴ Some waste leached into the river, causing chemical burns and a number of deaths.¹⁵ Italy was eventually forced, under the spotlight of international media attention and pressure from Nigeria (after the Nigerian seizure of an unrelated Italian ship), to repackage the waste and send it back to Italy for appropriate disposal.¹⁶ On its return trip to Italy, the ship bearing the waste was refused port in Spain, Denmark, the Netherlands, and the United States.¹⁷ As a result of this and similar scandals, Nigeria and Cameroon banned the importation of hazardous waste and instituted the death penalty for anyone found to be violating the ban.¹⁸

This toxic waste trade was denounced by some as “Eco-Imperialism” and there were increasing calls by developing countries to halt the waste trade entirely,¹⁹ a commercial activity worth millions of dollars. Action needed to be taken at both the domestic and international level. The difficulties faced by the United States in preventing shipments to countries with little capacity to manage and dispose of waste, and the problems posed by the differences in the definition of “hazardous waste” in European countries led to an increasing recognition of the need for an international framework to establish universal standards for the management and disposal of waste shipped across borders. Yet there was no meaningful international law in place. Spurred by national and regional initiatives, in the early 1980s both UNEP and the OECD turned their focus to the management of hazardous wastes.

The OECD promulgated the first international instrument

14. *Id.* pt. A(1)-(2).

15. *See id.* pt. A(2) (discussing chemical burns and premature births caused by the waste); Anthony Akaeze, *Koko: 23 Years after the Toxic Waste Dump*, NEWSWATCH (Aug. 16, 2010),

http://www.newswatchngr.com/index.php?option=com_content&task=view&id=2343&Itemid=42 (discussing deaths caused by the waste).

16. *See* Poropot et al, *supra* note 13, pts. A(2), B(5).

17. Seaport Env'tl. Sec. Network, Int'l Network for Env'tl. Compliance & Enforcement, *The International Hazardous Waste Trade Through Seaports 2* (Nov. 24, 2009), http://www.inece.org/seaport/SeaportWorkingPaper_24November.pdf (unnumbered working paper).

18. Charles P. Wallace, *Asia Tires of Being the World's Toxic Waste Dumping Ground*, L.A. TIMES, Mar. 23, 1994, at A3.

19. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 149 (2004).

regarding the international movement of hazardous waste in 1984 with its Decision-Recommendation of the Council on Transfrontier Movements of Hazardous Waste, mandating OECD member states to ensure that competent authorities of countries affected by the shipments of hazardous waste are provided “adequate and timely” information on its movement.²⁰ The OECD also adopted a series of far-reaching, though nonbinding, recommendations. These included the principle that prior consent from the importing and transit states should be obtained for intra-OECD shipments of waste; the requirement that the exporter should provide detailed information to the importing country regarding the origin, nature, composition, and quantity of the waste to be shipped as well as environmental risks involved in transport; and the obligation of the generator to dispose of the waste if an importer cannot safely dispose of it.²¹

In 1986, these same guidelines were extended to transboundary shipments of waste involving OECD members and nonmember states.²² The 1986 OECD Decision-Recommendation of the Council on Exports of Hazardous Wastes from the OECD Area, among other things, prohibited both the export of hazardous waste to non-OECD countries without prior consent from the receiving country or notice to transit nations, and the export of hazardous waste to non-OECD states that lack the proper disposal facilities.²³ Despite these impressive initiatives, numerous problems accompanied the implementation of this regulatory regime.

Spurred by high-profile international incidents involving the shipment of hazardous wastes to developing countries, in 1987 UNEP's Governing Council adopted the Cairo Guidelines. The Cairo Guidelines were a nonbinding agreement on environmentally sound management of hazardous waste.²⁴ UNEP's Governing Council also

20. OECD, *Decision-Recommendation of the Council on the Reduction of Transfrontier Movements of Hazardous Waste*, art. I, OECD Doc. C(83)180/FINAL (Feb. 1, 1984), reprinted in 23 I.L.M. 214 (1984) [hereinafter *Decision on Transfrontier Waste Movement*].

21. See Principles Concerning Transfrontier Movements of Hazardous Waste, ¶¶ 2, 3, 5, appended to *Decision on Transfrontier Waste Movement*, supra note 20.

22. See generally OECD, *Decision-Recommendation of the Council on Exports of Hazardous Wastes from the OECD Area*, OECD Doc. C(86)64/FINAL (June 5, 1986) [hereinafter *Decision on Waste Exports*], reprinted in 25 I.L.M. 1010 (1986).

23. See Measures Concerning the Control of Exports of Hazardous Wastes, ¶¶ 1, 4(c)(ii), appended to *Decision on Waste Exports*, supra note 22; see also OECD, *Decision of the Council on Transfrontier Movements of Hazardous Wastes*, OECD Doc. C(88)90/FINAL, Annex (May 27, 1988), as reprinted in 28 I.L.M. 257 (1989) (revising the definition of hazardous waste).

24. See United Nations Env't Program, Cairo Guidelines and Principles for the

agreed to commence international negotiations on a binding legal instrument governing the transboundary movements of hazardous waste.²⁵ This draft was eventually negotiated into the Basel Convention, which was concluded on March 22, 1989.²⁶

The role of the OECD's earlier decision and recommendations in influencing UNEP action is noteworthy. These agreements served as a template for the Basel Convention negotiations.²⁷ It is no exaggeration to say that lawmaking at the OECD provided both the impetus and the foundation for more far-reaching agreements in the United Nations. Indeed, article 11 of the Basel Convention provides an explicit exemption for trade with nonparties who are members of comparable agreements.²⁸ This has allowed the United States to remain a nonparty and trade with other OECD member states through the OECD decision framework.

II. THE BRIBERY CONVENTION

The OECD's work on bribery provides a similar example of using recommendations and decisions to spur agreements in other international fora. In 1975, the U.N. General Assembly adopted by consensus a resolution on "Measures against corrupt practices of transnational and other corporations, their intermediaries, and others involved." This led four years later to a draft convention on illicit payments. The draft convention was never adopted, however, because developing countries demanded adoption of stronger corporate codes as a precondition for their support. As India stated on behalf of the G77, "the UN Conference on an International Agreement on Illicit Payments [can] be convened *only after* completion of the UN Conference on a Code of Conduct on Transnational Corporation." Developed countries, opposed the Code of Conduct and, as a result, neither the code nor the draft convention on illicit payments was adopted.

Environmentally Sound Management of Hazardous Wastes, U.N. Doc. UNEP/WG.122/3 (Dec. 10, 1985), *reprinted in* 8 UNITED NATIONS ENV'T PROGRAM, ENVIRONMENTAL LAW GUIDELINES AND PRINCIPLES (1987); *see also* United Nations Env't Program, Governing Council, Environmentally Sound Management of Hazardous Wastes, 14th Sess., U.N. Doc. UDEP/GC.14/30 (June 17, 1987) (adopting the Cairo Guidelines).

25. Carol Annette Petsonk, *The Role of the United Nations Environment Programme (UNEP) in the Development of International Environmental Law*, 5 AM. U.J. INT'L L. & POL'Y 351, 373-74 (1990).

26. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57 [hereinafter Basel Convention].

27. *See* Petsonk, *supra* note 25, at 374.

28. Basel Convention, *supra* note 26, art. 11.

It took almost twenty years later for the OECD, without developing country opposition, to address the issue directly. Following extensive discussions amongst member countries, the OECD adopted recommendations in 1994, 1996, and 1997 on various aspects of bribery, calling on member countries to combat international corruption by making bribery of foreign public officials a crime, preventing tax deductions for bribes, prohibiting corruption in contracts funded by development assistance programs, and creating effective company rules on accounting and auditing to reveal practices of bribery. In December, 1997, the member countries and five nonmembers agreed to a decision that made binding the steps agreed to in previous recommendations. The Convention on Combating Bribery provided for monitoring by the Working Group on Bribery in International Business Transactions to ensure full implementation. Soon after, the United Nations adopted a declaration against bribery referring to the OECD and Organization of American States Conventions and passed a code of conduct for public officials.²⁹

III. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES

Following revelations in the early 1970s of wide-scale unethical and illegal activities by multinational companies, the United Nations, International Labor Organization, OECD, and national governments focused on means to influence their behavior. Much of the early activity centered on the United Nation's attempt to draft a Code of Conduct on Transnational Corporations. The U.N. General Assembly adopted a consensus resolution on measures against corrupt transnational practices, but failed to follow up with a stronger legal instrument. One year later, in 1976 the OECD Council of Ministers adopted a recommendation entitled the Declaration on International Investment and Multinational Enterprises.

As its name suggests, the overriding purpose of the Declaration is to promote transnational investment.³⁰ To this end, the Declaration called for member countries to respect national treatment (according comparable treatment to foreign-controlled enterprises as accorded to domestic enterprises), minimize conflicting requirements on multinational enterprises (MNEs) by different governments, and make transparent incentives and disincentives to

29. Salzman & Terracino, *supra* note 2, at 321–22 (citations and footnotes omitted).

30. *Id.* at 331–32 (footnotes omitted).

investment.³¹ In its introduction and seven chapters, the original Guidelines for Multinational Enterprises (Guidelines) covered a wide breadth of issues governing investments.³² The separate chapters range from such topics as information disclosure, competition, and financing to taxation, science, and technology but the requirements are generally vague and hortatory.

One of its chapters set forth voluntary rules of conduct for MNEs. These Guidelines were necessary to promote investment, it was argued, in order to prevent misunderstandings and build an atmosphere of confidence and predictability between business, labor and governments. The Guidelines, it was hoped, would ensure that the operation of MNEs was compatible with the expectations of the host country by establishing a baseline of labor rights.³³

Implementation of the Guidelines commences at the national contact points within national governments.³⁴ National contact points serve as the initial stage of consideration for issues and conflicts arising under the Guidelines. Any party who believes the Guidelines have been violated may request consultations with the Contact Points. If the discussions at this level do not resolve the issue between the parties, it can be passed to the OECD's Committee on International Investment and Multinational Enterprises (CIME). CIME, located within the Directorate for Financial, Fiscal and Enterprise Affairs (DAFFE), is ultimately responsible for adjudication and development of the Guidelines. In response to disputes passed up by the National Contact Points, CIME responds by clarifying or interpreting specific language. All CIME decisions require consensus among the member countries.

Dispute resolution under the Guidelines should not be thought of

31. See generally ORG. ECON. CO-OPERATION & DEV., *Declaration on International Investment and Multinational Enterprises*, in DECLARATION BY THE GOVERNMENTS OF OECD MEMBER COUNTRIES AND DECISIONS OF THE OECD COUNCIL ON GUIDELINES FOR MULTINATIONAL ENTERPRISES, NATIONAL TREATMENT, INTERNATIONAL INVESTMENT INCENTIVES AND DISINCENTIVES, CONSULTATION PROCEDURES 7 (1976). The *Declaration on International Investment and Multinational Enterprises* was updated in 2000. OECD, *The OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts*, OECD Doc. DAFFE/IME(2000)20 (Nov. 9, 2000).

32. See generally ORG. ECON. CO-OPERATION & DEV., *Guidelines for Multinational Enterprises*, in DECLARATION BY THE GOVERNMENTS OF OECD MEMBER COUNTRIES AND DECISIONS OF THE OECD COUNCIL ON GUIDELINES FOR MULTINATIONAL ENTERPRISES, NATIONAL TREATMENT, INTERNATIONAL INVESTMENT INCENTIVES AND DISINCENTIVES, CONSULTATION PROCEDURES 7 (1976).

33. Salzman & Terracino, *supra* note 2, at 332.

34. *Id.* at 335.

as a traditional judicial model, for CIME's decisions have no retrospective applicability. Indeed since the Guidelines were adopted as recommendations, they cannot be treated as binding standards. CIME's judgments do not enforce the Guidelines against either of the parties. Perhaps surprisingly, given the formality of the process, CIME makes a judgment on the behavior of the companies in question. Instead it uses the case to clarify the *meaning* of how a provision in the Guidelines should be applied in *future* cases. In a legislative context, the closest analogy to this practice would be if the U.S. Congress continued creating legislative history *after* its passage of a statute. The logic behind this system is similar to that of the common law's clarification of doctrine in specific applications. Unlike the common law analogue, however, CIME interpretations are never binding once established.³⁵

Despite critics, the Guidelines' are widely viewed as meaningful. Richard Rowan, a professor at the Wharton Business School, contends that the Guidelines provide useful mechanisms to influence OECD member countries and their corporations through surveillance and peer pressure. The Guidelines, he claims,

have been used by the international union movement to support broader union goals. Publicity pertaining to the cases has led to union pressure for the establishment of binding guidelines and legislation. This has been evident . . . in the pressure placed by the European Trade Union Confederation on the European Commission for the passage of the *Vredeling* proposal.³⁶

In a later book, Rowan argued that the Guidelines could serve the role of "enforced international regulation of multinationals" through adverse publicity.³⁷ And, in fact, there are several examples of this.³⁸

35. *Id.* at 336.

36. See Richard L. Rowan, Co-director, Indus. Research Unit, Wharton Sch., Univ. of Penn., Remarks at the Kenneth M. Piper Lecture at the Chicago-Kent College of Law: Transnational Regulation of the Labor Relations of Multinational Enterprises (Mar. 31, 1982), in 58 CHI-KENT L. REV. 909, 928 (1982). The Vredeling proposal requires employers to provide information to and consult with local employees at least forty days prior to decisions that are liable to have a substantial effect on the interests of employees, including the rationale for the decision as well as the legal, economic, and social consequences to employees. See ROGER BLANPAIN, EUROPEAN LABOUR LAW 764 (12 ed. 2010).

37. DUNCAN C. CAMPBELL & RICHARD L. ROWAN, MULTINATIONAL ENTERPRISES AND THE OECD INDUSTRIAL RELATIONS GUIDELINES 7 (1983).

38. See *id.* at 7-8 (discussing challenges brought under the Guidelines). Lance Compa argues that:

In the 1980s, a U.S. union facing anti-labor conduct by the local management of a U.S. subsidiary of the Swedish Electrolux corporation used the OECD contact points system. Swedish unions pressured their government to

IV. THE MULTILATERAL AGREEMENT ON INVESTMENT

These three previous case studies have all suggested a clear pattern. A topic of major concern arises on the international stage, such as hazardous waste trade, bribery, or corporate conduct. Efforts within the United Nations or other international organizations to draft an agreement are unsuccessful. The OECD proceeds on its own and provides an agreement that serves as the basis for future negotiations in fora with wider membership. The keys to this approach are opportunism and path dependence. The OECD serves as an advantageous forum to host negotiations, in part because of its significant technical expertise, in part because of its membership of like-minded countries, and in part because of its closed proceedings. As we have seen, this can be a very effective strategy to provide the tracks on which the train of international agreements proceeds. But it does not always work. This is most evident in the story of the Multilateral Agreement on Investment (MAI).

In the early 1990s, the OECD's CIME commenced a research project known as the Wider Investment Instrument Project. The project reflected the concern among member countries that existing multilateral instruments governing foreign direct investment (FDI) had become inadequate in the face of unprecedented increases in investment. Flows of foreign capital to developing countries, for example, had increased ten-fold from 1982 to 1993 and almost twenty-fold by 1996, with a 40% increase in FDI inflows from 1994 to 1995 alone. Total FDI exceeded the value of goods in trade by more than five-fold yet, remarkably, no comprehensive agreement existed at the international legal governing FDI.

Absent a General Agreement on Tariffs and Trade (GATT) or other treaty, the international legal framework governing FDI has developed in a piecemeal, incremental approach through a broad network of bilateral investment treaties (BITs). BITs both establish and clarify the rights of foreign investors. Mirroring the growth of FDI, the number of BITs has dramatically increased, as well. From 1989 to 1995, more BITs were negotiated than during the previous

persuade Swedish parent company managers to convince U.S. executives to halt their objectionable conduct. In 1990, the United Food and Commercial Workers made a similar move to the OECD in a dispute with the Belgium-based Carrefour supermarket chain. International pressure that included solidarity moves by Belgian unions brought about a settlement in April 1991, by which the company recognized the union and entered into bargaining.

Lance Compa, *The Multilateral Agreement on Investment and International Labor Rights: A Failed Connection*, 31 CORNELL INT'L L.J. 683, 690 (1998).

three decades. By 1995, over 900 BITs had been signed between more than 150 nations. Through its Wider Investment Instrument Project, the OECD member countries sought to bring order to this proliferation of FDI and BITs, perhaps through an agreement that consolidated and harmonized the many BITs—through a multilateral agreement on investment.³⁹

During the Uruguay Round, a number of countries had sought to harmonize the patchwork of BITs through an MAI. The United States and others proposed a comprehensive investment agreement but faced concerted opposition from developing countries. The ultimate compromise, the Agreement on Trade-Related Investment Measures (TRIMs Agreement), addressed investment restrictions that directly affect trade flows in goods. While it represented the first global agreement specifically directed at FDI since 1947, the TRIMs Agreement's narrow focus on investment measures that distort trade left the most important investment measures outside the agreement and, therefore, outside the scope of the WTO dispute settlement process. Described by one commentator as "a useful if somewhat meagre result of five years of tough negotiation," the TRIMs Agreement was not viewed at the time as a significant achievement, largely re-stating GATT law. Several other Uruguay Round agreements, most notably the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights, created disciplines liberalizing FDI but these only represented first steps, failing to address the bulk of FDI.⁴⁰

Against this backdrop of failure, following the completion of over seventy preparatory studies, in 1995 CIME and the Committee on Capital Movements and Invisible Transactions (CMIT) reported to the OECD Council that "the foundations have now been laid for the successful negotiation of . . . [an MAI] building on OECD's existing instruments and expertise." Based on this advice, the OECD Council decided to move from research of BITs to negotiation of the MAI. The stated goal was to complete the treaty by May 1997. A high-level negotiating group was established outside the directorate structure, serviced by DAFPE (primarily from CIME) secretariat staff. They were given a mandate to create an agreement that would:

provide a broad multinational framework for international

39. Salzman & Terracino, *supra* note 2, at 355 (citations and footnotes omitted).

40. *Id.* at 361–62 (citations and footnotes omitted).

investment with high standard for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures; be a free-standing international treaty open to all OECD Members and the European Communities, and to accession by non-OECD Member countries.

Drafting groups and preparatory groups were established to address specific issues and flesh out areas of agreement before going to the main negotiating group in plenary session. All the member countries participated and within two years, eight nonmember countries had joined as observers.

From the outset, the MAI negotiations were regarded internally by the secretariat as a relatively straightforward technical harmonization exercise. Given that there was a great deal in common among the many investment treaties, it was expected that the OECD secretariat would review the range of BIT texts, identify common features, and create a unifying draft that would form the basis of a general agreement. The MAI, it was hoped, would be the first comprehensive international investment treaty creating uniform rules for FDI protection, liberalization, and dispute settlement. By creating a more level playing field than the bumpy terrain of BITs, the MAI would greatly reduce distortions to investment flows and therefore speed the growth of FDI, significantly promoting the liberalization of investment measures and performance requirements beyond the results of the Uruguay Round agreements. If adopted, the MAI would supersede the OECD Codes and the Declaration, providing in their place an agreement with substance and teeth.

It is important to remember that the OECD was chosen as the negotiating forum for the MAI by the member countries, not by the OECD staff itself. When controversy erupted over the negotiations in 1997, selection of the OECD as a negotiating forum was criticized as a dubious choice, at best. In many respects, though, this was an eminently reasonable decision, for the OECD seemingly offered three comparative institutional advantages over rival negotiating fora.

First, the goal of the negotiations was consistent with the OECD's founding goal of liberalizing trade and capital flows. The OECD had much greater in-house expertise (in particular the DAFWE secretariat in CIME and CMIT) on international investment issues than the other relevant IGOs, particularly the trade-focused WTO and the United Nations Committee on Trade and Development (UNCTAD). This was the same organization, after all, that had drafted the Investment Codes in the first place. The secretariat

considered the undertaking strictly an *analytical* project that made use of the OECD's substantial institutional knowledge.⁴¹

Second, the OECD had a successful record in hosting international negotiations. OECD recommendations and decisions are adopted every year, often involving intensive negotiation among member countries. During the same period as the Wider Investment Instrument Project, for example, the OECD successfully served as the negotiating forum for the bribery convention.

Finally, and perhaps most important, the OECD's restricted membership increased the likelihood of success. Aside from the newest members, all the OECD governments had worked closely together in the past for the purpose of liberalizing investment flows and could be expected to favor an MAI. After all, by the time of the MAI all the OECD member countries had removed exchange controls and further rolled back restrictions on inward FDI both through unilateral steps and as part of regional trade agreements within the European Union and NAFTA. OECD members accounted for 85% of all FDI outflows.

It also seems likely that the concerted opposition by developing countries in the WTO provided a strong incentive to negotiate the MAI at the OECD. If it were not possible to gain broad developing country support for global investment rules, then negotiations at fora with inclusive membership such as the WTO or UNCTAD would prove fruitless. The like-mindedness of OECD member countries is the *raison d'être* for the organization's existence. Why not, then, commence MAI negotiations in a forum where success seemed more assured? The OECD Council's decision to commence negotiations of the MAI came shortly after the Final Act of the Uruguay Round. The shift of investment negotiations from the WTO to the OECD certainly suggests a causal influence.⁴²

The OECD member countries appear to have relied on a "build it and they will come" strategy of treaty development. From the outset, it was expected that the MAI would be a free-standing treaty open to accession by nonmember countries on a negotiated basis. In many respects this was no different than the history of the GATT. The original contracting parties in 1947 surely expected that other countries would accede to the treaty and adopt the GATT's disciplines as the benefits of liberalized trade become clear. Nor did the Treaty of Rome and subsequent European Community and

41. *Id.* at 362–64 (citations and footnotes omitted).

42. *Id.* at 364–65 (citations and footnotes omitted).

European Union treaties dissuade hopeful applicants for membership despite the requirement that the established laws must be accepted as a condition to accession. It was the explicit strategy of some of the member countries (and certainly of the European Union) to use the result of OECD negotiations as the basis for an even broader WTO agreement on direct investment. The communiqué from the 1996 OECD ministerial meeting declared the member countries' "interest in beginning an examination of trade and investment in the WTO and working towards a consensus, perhaps including the possibility of negotiations."⁴³

Moreover, despite the later assertions of MAI critics, MAI negotiations were never concealed as a covert fact or held in secret. To the contrary, the activities were announced in OECD press releases, articles were published in the organization's magazine, the *OECD Observer*, and many of the conference papers were posted on the OECD Internet website created for the MAI in June, 1996. Indeed the OECD held an early press conference to discuss issues concerning negotiation of the MAI and no one showed up.⁴⁴ In a matter of months, though, this radically changed.

Indeed, the rapidity and effectiveness of nongovernmental organization (NGO) opposition to the MAI was unprecedented. From the end of 1995, a small number of NGOs started to follow the negotiations and oppose both the goals and content of the MAI process. The OECD held an informal meeting with interested NGOs in December of 1996. While the OECD was open in terms of announcing the process of the negotiations and their general status, in keeping with OECD procedures the internal documents were restricted. In February, 1997, however, the group Public Citizen, founded by Ralph Nader, got hold of the current chairman's draft (i.e. the consolidated negotiating text up to that point) and posted it on the Internet. This posting provided the catalyst for widespread and hard line opposition of NGOs against the MAI. Just two months later, a more formal meeting for NGOs was hosted by members of the negotiating group and secretariat officials. While the OECD's first consultative meeting with interested groups about the MAI had been in an empty room, the October briefing attracted over seventy representatives from thirty groups around the world. In a mere matter of months, through the Internet and e-mail a global campaign against the MAI had come into being. Drafts and bulletins

43. *Id.* at 366–67 (citations and footnotes omitted).

44. *Id.* at 368.

on the MAI were now regularly posted on a host of NGO websites. By 1998, anti-MAI campaigns were active in more than half of the OECD countries as well as many developing countries.⁴⁵

The impact of a global NGO campaign against the MAI was quickly felt. By the time the chairman's draft was issued in early 1998, with the exception of mandated national contact points, many of the NGOs' demands had been met. Despite earlier protestations by some member countries, text was inserted to prohibit the lowering of social and environmental standards to attract FDI, to ensure that treaty obligations would not prevent governments from maintaining (or heightening) protective social and environmental standards, and to ban claims by foreign investors for compensation for losses caused by nondiscriminatory regulatory actions.

These concessions, however, came too late, for the NGO campaign had taken on a life of its own in domestic politics.⁴⁶ In this setting the OECD's lack of experience in managing highly contentious negotiations proved fatal. As the OECD's secretary-general later acknowledged, the OECD was badly outgunned in the world of public relations. The OECD's reactions to growing NGO attacks—more press conferences and enhancing the MAI homepage on its website—had the same effect as whistling into a storm.⁴⁷

In early 1998, seeking to resurrect the chances of renewed fast track authority from Congress, the Clinton Administration curried favor with local constituencies by denouncing the MAI as “fatally flawed” and demanding that it be reconsidered. Domestic opposition also flared up in Paris, where demonstrations in February took aim at the impact of the MAI on France's ability to protect its cultural heritage. In response, the MAI negotiations were formally suspended for six months for a period of assessment by the negotiating parties. On October 14, one week before negotiations were scheduled to resume, Prime Minister Jospin of France released an official statement in the Chamber of Deputies, declaring that since the MAI posed “fundamental problems with respect to the sovereignty of states” and was in its current state “unreformable,” that France would pull out of the negotiations. One of the MAI's strongest early proponents, France held out the possibility of resuming negotiations but only on “an entirely new

45. *Id.* at 376.

46. *Id.* at 378–80 (citations and footnotes omitted).

47. *Id.* at 377–78.

basis.” Its abandonment of negotiations meant the European Union had to follow, effectively dooming the OECD’s negotiation of an MAI.⁴⁸

With the MAI, the OECD’s model of negotiating a foundational agreement among its members and then using that as the basis for further negotiations in other fora failed. It is beyond the scope of this Article to go into the substantive reasons for the MAI’s demise but one point stands out. Both the OECD secretariat and the member country governments clearly underestimated the political sensitivity and implications of an MAI. They thought negotiation of the MAI was a technical exercise, requiring expertise the OECD was uniquely well suited to provide. As a result, the country delegates failed to ask for high-level political support at the outset. Realization that the seemingly technical matters had significant political implications came too late in the game. In retrospect, too, it’s clear that the OECD had neither the capacity nor experience to respond to a concerted NGO campaign. The OECD as an institution was not used to being in the public spotlight.⁴⁹

V. CONDITIONAL AGENDA SETTING

There are two key lessons one can draw from these case studies about the OECD’s role in international law-making. The first is the importance of what might be termed conditional agenda setting. As mentioned above, Anne-Marie Slaughter held out the OECD as a model for future international organizations. The basis for her prediction lies in the growth of transgovernmentalism—cooperative problem-solving by global networks of *subparts* of the state such as courts, agencies, legislatures, and executives. “These parts,” Slaughter argues, “are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order. . . . [T]ransgovernmentalism is rapidly becoming the most widespread and effective mode of international governance”

As recognized by Slaughter, though often overlooked, the OECD exercises enormous influence simply through its organizational activities.⁵⁰ Consider that the OECD’s committees, working groups, expert groups, and conferences bring together approximately *40,000 government officials and experts annually*. Inevitably, some

48. *Id.* at 380 (citations omitted).

49. *Id.* at 382.

50. *Id.* at 386 (citations omitted).

of these gatherings coalesce into a core of identifiable groups of experts that exercise influence over the delineation of policy challenges and strategic analysis of their resolution.⁵¹ Beyond guiding and informing the secretariat's activities, these repeated encounters can subtly (and sometimes not so subtly) guide the officials' attitudes and activities, as well. As a classic international relations article observed over twenty-five years ago:

When the same officials meet recurrently, they sometimes develop a sense of collegiality which may be reinforced by their membership in a common profession, such as economics, physics, or meteorology. Individual officials may even define their roles partly in relation to their transnational reference group rather than in purely national terms ... Regularized patterns of policy coordination can therefore create attitudes and relationships that will at least marginally change policy or affect its implementation.⁵²

Put simply, by providing a forum for government officials and nongovernmental experts to meet and share research and experiences on cutting edge policy issues, institutions can frame the issues for future collective consideration, lay the groundwork for agreement and identify whose the influential voices in the policy debate shall be.⁵³

Richard Stewart has described one such activity of coordination as "horizontal arrangements" of administrative law that "involve informal cooperation among national regulatory officials to coordinate policies and enforcement practices in areas such as antitrust, telecommunications, chemicals regulation, and transportation safety."⁵⁴ This coordination, he writes, "helps to reduce barriers to trade and commerce created by differing national regulations and to address transnational regulatory problems that exceed purely domestic capabilities."⁵⁵ These actions operate below the radar screen of what we normally consider to be

51. *Id.* at 388 (citations and footnotes omitted).

52. *Id.* at 386 (citations omitted).

53. *Id.* at 387 (citations and footnotes omitted).

54. Richard B. Stewart, Essay, *Administrative Law In The Twenty-first Century*, 78 N.Y.U. L. REV. 437, 455 (2003).

55. *Id.* This is reinforced by the observation of Krause and Nye that "[w]ith the growth of economic interdependence, more bureaucracies that were once considered domestic become involved in international affairs. Many bureaucracies and agencies of governments have similar interests. *In some cases, the similarity of interests is greater across national lines than it is with competing domestic agencies and interests.*" Lawrence B. Kraus & Joseph S. Nye, *Reflections on the Economics and Politics of International Economic Organizations*, 29 INT'L ORGS. 323, 337 (1975) (emphasis added).

lawmaking activities but may significantly influence agency activities. As Stewart notes, a horizontal network of agency officials may agree informally to a common regulatory policy that is subsequently implemented domestically by participating U.S. regulators through rulemaking or enforcement actions. While these domestic implementing decisions are subject to U.S. administrative law procedures and judicial review, the underlying policy was adopted through extranational processes that are not. Moreover, in some cases there may be no formal domestic decision at all, but merely administrative exercise of discretion—for example, a decision not to enforce U.S. requirements against imported products because of a prior informal agreement on functional equivalence or mutual recognition of regulatory standards.⁵⁶

VI. NEGOTIATION FORUM SHOPPING

The second lesson one can draw from the OECD's involvement in international law-making is the dynamic of negotiation forum shopping. In a world of overlap among international organizations, competition inevitably results as institutions maneuver for the scarce attention and resources of sovereign states. Forum shopping is an important aspect of litigation in the United States, as parties seek jurisdictions most favorable to their position, and it is no less important in the international community. As Krause and Nye have observed:

Too little attention is given to the political process by which agendas are set in world politics. The choice of organizational arena often has an important effect on setting the agenda. Moreover, the different jurisdictional scope and the differing composition of delegations to different organizations frequently result in quite different distributions of influence and outcomes. The same issue may come out quite differently in the GATT than in UNCTAD. States try to steer issues to power arenas more favorable to their preferred outcomes.

What does an international institution need to develop a meaningful agreement? It needs information, key players at the table, and a formal structure to hammer out differences. The OECD provides all three. The central defining feature of the OECD, though, is its membership. The term, "OECD nations" clearly conveys images of wealthy industrialized countries, of a rich man's club, just as UNCTAD denotes images of developing countries with export-based economies. The importance of the OECD members' like-mindedness cannot be overestimated, nor can the organization's

56. Stewart, *supra* note 54, at 456.

explicitly economic perspective on policy issues. While the OECD may be chosen to work on an issue because of its powerful research capacity, it may also be chosen by a member country as a *competing* forum to other institutions working on the same issue. The OECD was chosen in part as the negotiating forum for the MAI because of its in-house expertise, but its members' commitment to economic liberalization was surely significant as well. Negotiations on the MAI commenced at the OECD only after earlier attempts to negotiate an MAI at the broader-based WTO had failed. Similarly, negotiation of the OECD Guidelines commenced at the OECD during the same period that efforts to develop corporate codes of conduct at the United Nations became blocked. The same could be said for the Bribery Convention and Hazardous Waste Trade. Continuing negotiation at the OECD ensured not only a greater likelihood of reaching a final agreement, but an agreement that promoted economic liberalism.⁵⁷

The "build it and they will come" strategy of negotiation followed in the MAI, Basel Convention, and other examples cited in this Article, though, clearly shows that an expanded membership may not be necessary to set the agendas of other institutions. While the OECD's restricted membership allows it to reach agreements that could not be brokered in more inclusive fora, once such agreements have been completed it provides the impetus and grounding for development of treaties and conventions at other IGOs. This strategy of reaching agreement at the OECD and then passing the adopted text to IGOs with broader membership is one of foundation-laying, though it can equally be viewed as strategic *preemption*.⁵⁸

This ability to reach agreement on issues that international organizations with larger membership have previously been unable to address meaningfully has been a unique strength of the OECD.⁵⁹ Much as a small negotiating committee exercises enormous influence by brokering deals that are then passed to the plenary for further discussion and potential adoption, by brokering an agreement among its members and then offering it to outside parties (either with no chance of amendment, as in the MAI case, or for development of a more comprehensive agreement as with the Basel Convention) the scope of possible compromises is effectively

57. Salzman & Terracino, *supra* note 2, at 393-94 (citations omitted).

58. *Id.* at 395.

59. *Id.* at 322.

set.⁶⁰ This strategy relies on the importance of path dependence in fixing the trajectory for future development. There are, of course, limits to such a strategy. The OECD's ability to set agendas is substantially weakened if the member countries cannot agree amongst themselves, the competing institutions have the capacity to broker separate agreements, or there exist few incentives for other countries to follow the OECD's lead.⁶¹

By providing a forum for government officials and nongovernmental experts to meet and share research and experiences on cutting edge policy issues, the OECD can frame the issues for future collective consideration, lay the groundwork for agreement and identify whose the influential voices in the policy debate shall be.⁶²

60. *Id.* at 396. A related form of agenda-setting that bears mention is sheer numbers. If OECD member country can form a common position (even absent a formal agreement), they represent a considerable voting bloc in other international organizations. During the author's time at the OECD, for example, the Environment Directorate held a special meeting of its Environment Committee to prepare for the U.N. Conference on Environment and Development. While agreement was not reached on a number of issues (particularly the Convention on Biological Diversity), this process developed a number of common policy positions among the member countries. *Id.* at 396 n.209.

61. *Id.* at 397.

62. *Id.* at 387 (citations and footnotes omitted).