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PROTECTION WITHOUT PROTECTIONISM: LINKING A MULTILATERAL  
INVESTMENT TREATY AND HUMAN RIGHTS

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God did not bestow all products upon all parts of the earth, but distributed His gifts over different regions, to the end that men might cultivate a social relationship because one would have need of the help of another. And so He called Commerce into being, that all men might be able to have common enjoyment of the fruits of the earth, no matter where produced.

-- Hugo Grotius\*

INTRODUCTION

1. This Paper<sup>1</sup> argues that a multilateral investment treaty (hereafter “MIT”) should include specific provisions on human rights – in other words, that investment and human rights should be linked. The arguments for linkage that appear in this paper are not conceptually new, but represent a distillation of the existing and large volume of work on linkages between international commerce and “social” issues like environmental protection and labor rights.<sup>2</sup> What is relatively new is the attempt to synthesize the arguments for linkage between economic and social issues and apply them to human rights, especially in the framework of global investment. Such a synthesis is necessary because the question of linkages between international commerce and

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\* De Jure Bellie Ac Pacis Libri Tres [On the Law of War and Peace, 1625] (Francis W. Kelsey trans, 1925), Book II, Ch. II, XIII, 5, cited in Isabella D. Bunn, Linkages Between Ethics and International Economic Law, Univ. Penn. 19 Journal of International Economic Law, (1998) pp. 319-327.

<sup>1</sup> Based on a lecture prepared for the Seminar “Nature and Contents of a Future Multilateral Investment Agreement – Free Markets or Institutional Frameworks?”, E.M. Meijers Institute of Legal Studies, University of Leiden, April 1, 1999. The title for this paper was suggested by T. Friedman, A Manifesto for the Fast World, The New York Times Magazine, March 28, 1999 pp.40-62, p.61.

<sup>2</sup> By “social issues” in this context I mean public policy concerns regarding the allotment of resources, whether economical, environmental or human within a given society. For international lawyers, the unit of social discourse is typically the nation State.

human rights has lagged behind considerations of other social issues, and it is this gap that this paper hopes to begin to bridge. Part 1 of this paper discusses in general terms the existing but unacknowledged connection between some human rights and global economic regimes. Part 2 synthesizes the arguments previously used for linkages of different issues with international trade instruments, specially environmental and labor issues, to provide a basic framework for a discussion of linkages between human rights and international investment. Part 3 builds on the previous sections to set out some concrete proposals about how human rights could and should be linked to an MIT. In doing so, this paper does not examine the merits or desirability of an international investment instrument, but simply argues that in drafting such an instrument, linkage with human rights is possible, is necessary, and is inevitable.

2. These considerations obviously spring from the aborted Multilateral Agreement on Investment (“MAI”) negotiated at the Organization for Economic Cooperation and Development, and this paper focuses on the OECD MAI only as an example of how to handle (or more exactly, how not to handle) linkages between investment rules and social issues. The MAI, which was an attempt to liberalize global investment, focused attention on the large and increasing role of international investment in the global economy. Over the last decade, the transboundary flow of capital and managerial control between private firms, so called Foreign Direct Investment (“FDI”), has become a central component of globalization and a potentially dominant avenue of development funds and technology transfers to developing countries.<sup>3</sup> Foreign portfolio investments (which, as opposed to FDI, the foreign investor does not have a large managerial role) have also risen significantly, and became the focus of much concern regarding the globalization process as a result of the economic crisis that swept several Asian and Latin American countries in 1997 and 1998. This new-found prominence for investment naturally resulted in greater scrutiny of the social impact of international investment, with the MAI as the lightning rod for the ensuing criticisms. The MAI failed in part due to its lack of adequate labor and environmental safeguards.<sup>4</sup> But at least the OECD did address some labor and environmental concerns in its MAI; human rights (except those included as labor rights) did not even receive a cursory treatment, and human rights groups were absent from negotiations about the MAI. However, in the wake of the MAI’s demise and talk of introducing a similar treaty in other fora, such as the WTO or the proposed Free Trade Area of the Americas, it is important to examine the linkage between an MIT and human rights.
3. This linkage is important not just because it advances the promotion and protection of human rights, but also because it supports a multilateral liberalizing economic instrument. That these two goals are compatible is a central contention of this paper.

## **LINKING AN MIT AND HUMAN RIGHTS**

### **The Intimate Link Between Economics and Social Issues**

4. Discussions about the role of economics in society are far beyond this paper’s ambitions, so suffice it to say that the basic point of economic policy and human rights is the same: forming a better society.<sup>5</sup> I repeat this basic proposition because it is often ignored by the those primarily responsible for drafting economic treaties – the economists. The other relevant group of

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<sup>3</sup> United Nations Conference on Trade and Development (UNCTAD), World Investment Report 1997, pp. xv – xxii.

<sup>4</sup> For a review of the MAI’s negotiating history and some of the reasons for its failure, see S. Zia-Zarifi, “The Multilateral Agreement on Investment: Special Report,” 9 Yb. Int’l Env. Law 345 -364 (1998).

<sup>5</sup> This contention is amply supported by a quick glance at history, through Moses’ defense of private property (“Thou shalt not steal”), the Confucian advocacy of a centralized market economy, Jesus’ attack on the money lenders, Islam’s support of trade and banning of usury, Marx’s materialistic dialectic, to the current day, and U.S. President Bill Clinton’s “it’s the economy, stupid.”

scholars and actors, namely the human rights community, has long accepted economic development as an important component of its agenda at least since the Universal Declaration of Human Rights and the two international covenants on human rights (the ICCPR and the ICESCR) enumerated the right to work, the right to organize labor, and the right to earn a living wage among basic human rights. These instruments, based on arguments of absolute rights and social justice, nevertheless intimately involve economic considerations, especially where the protection of particular human rights have important economic consequences. The increasing number of statements about economic policy emanating from human rights advocacy organs and institutions is one easy marker of their growing (albeit still weak) awareness of the link between human rights and global commerce.<sup>6</sup> It is also clear that the general public considers economic and social issues together, as demonstrated by the debates surrounding the North American Free Trade Agreement, not to mention the OECD's failure in gathering public support for the MAI.<sup>7</sup>

5. Thus it is important to remember that both economic policy and human rights are significant to the polity, and one set of concerns does not inherently preempt the other. Indeed, it is impossible to discuss one without the other, because any argument for human rights necessarily encompasses economic activity (the cost of providing due process, the formation of trade unions, the proper training of personnel, the cost of building classrooms) and any justification for economic policy relies on promised social improvements (the generation of wealth, the increase in development, the protection of ownership rights, the decrease of unemployment). The point of reiterating the existing and intimate connection between economic policies and human rights is to seek clarification of the social impact of economic instruments and the economic impact of human rights instruments. While proponents of free trade may see the issues as one of market freedom, to human rights activists the question was clearly one of abrogating existing and clear international standards regarding the duty of States to redress impermissible violations of human rights.<sup>8</sup> Without explicitly addressing and linking these concerns, crucial questions remain: Who gets to decide if a given measure is called for by international human rights obligations, or is hidden protectionism? Should human rights bodies interpret these economic principles, or should trade bodies address human rights obligations?

### **The Human Rights Content of an MIT**

6. It is first necessary to identify what we mean by human rights, and which of these rights could and should be linked to an instrument on international investment. Unfortunately, these important analytic questions have not yet received sufficient attention from either human rights scholars or economists. Beyond general exhortations from the human rights community that economic treaties in general should take human rights into account, or the piecemeal references to social and human development cited in various economic instruments, there has been no

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<sup>6</sup> See, for instance, the recent statements from the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities about the responsibility of States to create a social and economic system that supports and advances basic economic, social and cultural rights. Sub-Committee's report, *The Realization of Economic, Social and Cultural Rights: The relationship between the enjoyment of human rights, in particular economic, social and cultural rights, and income distribution*, E/CN.4/Sub.2/1998/8.

<sup>7</sup> Dunoff, *Trade and ...*, supra note XX, pp.767-768. For a more general discussion of the importance of societal values for trade instruments, see P. Nichols, *Trade Without Values*, 90 Nw. U. L. Rev. (1997) p.658, pp.691-709 (1997).

<sup>8</sup> The awkward interaction between the human rights and trade communities is redolent of the similar meeting between the environmental and trade communities. In the words of one environmentalist, "environmentalists came to the table not seeking leverage for their nefarious ends, but in a purely defensive posture at first. We noticed that the world trading system was beginning to interfere with our work: People who had never heard the word GATT were told, 'You can't do that because of GATT.'" Remarks by David K. Schorr, 89 Am. Soc'y Intl. L. Proc. 322 at 323 (1995), quoted in J. Dunoff, *The Misguided Debate Over NGO Participation at the WTO*, XX J Intl. Econ. L. 433 at 439 (1998).

comprehensive examination of the impact of investment rules and regulation on the fulfillment of human rights obligations.<sup>9</sup> Nevertheless, we can make some assumptions about those areas where human rights intersect most strongly with economic policies.

### *Social Rights*

7. To find human rights intersecting with economic considerations, the foremost source is naturally those body of rights set out in international treaties regarding economic, social and cultural rights, such as the ICESCR, the Convention for the Elimination of All Forms of Discrimination Against Women and the Convention for the Elimination of Racial Discrimination.<sup>10</sup> In general, these treaties combine a commitment to individual rights and dignity, especially of historically disadvantaged groups, with a liberal interventionist belief in the State's obligation to promote the progressive attainment of these rights.<sup>11</sup> To the extent that these rights relate to the economic issues and the conditions of labor, I will address them in the next section. The other kinds of rights, however, which we may refer to as "social" rights, range from the right to physical and mental health, the right to education and adequate food, clothing and housing.<sup>12</sup>
8. Although these instruments do not as a rule specify the means by which State parties must attain the enumerated social rights, they are nevertheless clear in demanding that State parties must allocate significant resources toward promoting and protecting these rights.<sup>13</sup> The thrust of this approach has historically been that economic development must be combined with the realization of human rights without any compromises.<sup>14</sup> More recently, there are signs that human rights scholars have recognized that in order to ensure States can implement the fundamental, inalienable rights set out in the international covenants, it may be necessary to engage in a more detailed, realistic examination of the economic underpinnings of these social rights.<sup>15</sup> At any rate, carrying out obligations of promoting and protecting social rights clearly involves important considerations of available economic strategies for States and therefore are inextricably linked with the issues surrounding an international trade or investment treaty.<sup>16</sup>

### *Labor Rights*

9. Since labor is one of the central activities of human society,<sup>17</sup> the conditions surrounding labor and laborers have always been a part of human rights. In the post WWII international legal regime, labor rights appear in Article 55 of the UN Charter, in the Universal Declaration of Human Rights, and the two main Covenants on human rights. Despite the obvious intimate

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<sup>9</sup> An interesting new set of quantitative research on the impact of liberalized economic principles on human rights in developing countries appeared in W. Meyer, *Human Rights and MNCs: Theory versus Quantitative Analysis*, 18 *Hum. Rts. Q.* 368 (1996), in which the author claimed that data showed a somewhat positive association between foreign investment and improving civil, political, social and economic human rights practices. Contradicting this assertion, and suggesting a slightly negative association between foreign investment and human rights, is J. Smith, M. Bolyard and A. Ippolito, *Human Rights and the Global Economy: A Response to Meyer*, 21 *Hum. Rts. Q.* 207 (1999).

<sup>10</sup> CONVENTIONS CITE.

<sup>11</sup> P. Alston and G. Quinn, *The Nature and Scope of State Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 *Hum. Rts. Q.* 156 (1987).

<sup>12</sup> ICESCR Art. 11-14. H. Steiner, p. 27-28.

<sup>13</sup> P. Alston and G. Quinn, p. 159.

<sup>14</sup> M. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development*, pp. 138-143 (1995)

<sup>15</sup> Steiner, p. 40-42.

<sup>16</sup> H. Steiner, *Social Rights and Economic Development: Converging Discourses?*, 4 *Buffalo Hum. Rts. Rev.* 25, 28 (1998).

<sup>17</sup> See, for instance, Nichols, p. 682;

connection between labor and human rights, historically human rights NGOs and labor unions seem to have operated without much overlap. Nevertheless, it is clear that their concerns are in fact parallel, or, more accurately, that they operate in two concentric circles focused on the right of individuals to earn the means of their subsistence.<sup>18</sup> It is clear that labor rights are a necessary part of human rights discourse.

10. Labor is also a necessary part of international trade discourse; economists as early as Ricardo considered the cost of labor as one of the factors determining comparative advantage. The impact of global liberalization and increased competition on labor and wages is a concern for both developed and developing nations. For developed countries, the fear is that jobs will migrate away to the cheaper markets of the developing world;<sup>19</sup> for developing countries, the fear is that competition for foreign investment will drive down already low labor standards – the so-called “race to the bottom.”<sup>20</sup> The typical governmental reaction to these developments, at either end of the development scale, is implementing protectionist measures. Therefore, any liberalizing trade and investment policy must address these concerns in order to be viable. In the words of the OECD, “Properly designed labour market and social policies that provide adequate income security while facilitating the redeployment of displaced workers into expanding firms and sectors produce important equity and efficiency gains.”<sup>21</sup>
11. However, the exact nature and scope of the labor rights that should or could be protected and linked to international trade are still disputed.<sup>22</sup> In 1998 the ILO identified four core rights which, the organization stated, have become so widely accepted as to constitute a part of customary international law,<sup>23</sup> and the OECD, for instance, has accepted these standards as authoritative.<sup>24</sup> These rights are:
  - Freedom of association and collective bargaining;
  - Elimination of exploitative forms of child labor;
  - Prohibition of forced labor and slavery; and
  - Non-discrimination in employment.
12. This list sets out the minimum labor rights that must be observed by all States, regardless of their economic strategy.<sup>25</sup> As such the protection and promotion of these rights has a significant impact on economic policies and international trade, and of necessity should be linked to an international trade and investment treaty.

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<sup>18</sup> See V. Leary, *The Paradox of Workers’ Rights as Human Rights*, in *Human Rights, Labor Rights, and International Trade* (L. Compa and S. Diamond, eds.), p. 22 (1996).

<sup>19</sup> This concern was especially acute in the U.S. and Canada during negotiations leading up to NAFTA. The most prominent advocate of this view has been Ravi Batra, who claimed that free trade led to the decline in the real wages of U.S. laborers in the 70s and 80s. R. Batra, *The Myth of Free Trade* (1993).

<sup>20</sup> R. Bhala, *Clarifying the Trade-Labor Link*, 37 *Columbia J. Transnat’l L.* (1998) p.12, pp.19-20 (1998).

<sup>21</sup> OECD, *Open Markets Matter: The Benefits of Trade and Investment Liberalisation*, Policy Brief No. 6-1998, p.6, available at <[www.oecd.org](http://www.oecd.org)>.

<sup>22</sup> V. Leary, *The Paradox of Workers’ Rights as Human Rights*, in *Human Rights, Labor Rights, and International Trade* (L. Compa and S. Diamond, eds.), p.22 (1996).

<sup>23</sup> International Labour Organisation, *ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up* (adopted June 18, 1998). For greater conceptual description of these core rights and their acceptance internationally, see Bhala, *The Trade-Labor Link*, supra note XX, pp.33-37.

<sup>24</sup> OECD, *Trade, Employment and Labor Standards, A Study of Core Workers’ Rights and International Trade* (1996).

<sup>25</sup> For a succinct discussion on these rights, see R. Bhala, *Clarifying the Trade-Labor Link*, 37 *Columbia J. Transnat’l Law* 12, 33-39 (1998). On other labor rights broader than these rather minimal standards, see S. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, Book Review of *Human Rights, Labor Rights, and International Trade*, supra n. 15, 76 *Texas L. Rev.* 1533 (1998).

13. The last category of human rights implicated by investment regulation is the one farthest from typical business school curricula on investment and, at the same time, the most notorious and attention-grabbing: unjust or illicit enrichment by directly engaging in or indirectly supporting internationally prohibited acts, as described in customary international law as *jus cogens* norms or in international treaties such as the Geneva Conventions, the Convention Against Torture, the International Criminal Law Convention. International law has recognized the link between commerce and crime at least since the Nuremberg trials, during which the US Military Tribunal convicted several German industrialists for their roles in financing and/or benefiting from commercial schemes whose activities violated acceptable rules of conduct (i.e., use of slave labor, production of chemical weapons, use misappropriation of occupied property).<sup>26</sup> More recently, US federal courts have entertained lawsuits against corporations financing and profiting from the activity of foreign governments involved in the use of slave labor and widespread environmental degradation.<sup>27</sup> Most clearly, trade sanctions have been used widely against States alleged to be violating international human rights standards, for instance against apartheid-era South Africa, against Saddam Hussein's Iraq, and, by the US especially, against a large number of countries failing to satisfy US standards for human rights.<sup>28</sup>
14. Without entering the debate about the efficacy or wisdom of trade measures as a tool of advancing human rights, suffice it to say that it is clear that the profit motive is widely circumscribed by international standards of behavior against the use of forced labor, financing of internationally recognized crimes, and involvement – direct or indirect – in violations of international law. These limits on international investment and trade, whether imposed unilaterally or multilaterally, must therefore be addressed in an MIT.<sup>29</sup>
15. This broad list is not intended as a comprehensive catalog of possible links between economic policy and human rights protection. For the most part, the list reflects linkages expressed by various institutions representing either human rights (including labor rights) or international trade. Thus, even if particular rights – or their omission – may be criticized, this list does serve as a starting point for discussing the interaction between an investment treaty with human rights. These rights, and the extent of their interaction with international investment rules, will become clearer in the following discussion regarding the scope and method of linking human rights with an MIT.

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<sup>26</sup> Consider, for instance, the I.G. Farben trial, *Law Reports of Trials of War Criminals* Volume X, p.1. The US Military Tribunal found the directors of this company guilty in a case whose allegations involved deportation, use of slave labor, torture, killings, plunder of occupied territory, production of internationally banned chemical weapons, and conduct of illegal experiments on unwilling human subjects. A. Clapham, *The International Criminal Court and the Question of Jurisdiction under International Criminal Law over Legal Persons Including MNCs*, in *The Accountability of Multinational Corporations Under International Law* (M. Kamminga and S. Zia-Zarifi eds.) (1999)(under publication).

<sup>27</sup> S. Zia-Zarifi, *Suing Multinationals in US Courts for Violating International Human Rights*, 4 *UCLA Int'l L. Rev.* (1999) XX (forthcoming).

<sup>28</sup> P. Stirling, *The Use of Trade Sanctions as an Enforcement Mechanism for Basic Human Rights: A Proposal for Addition to the World Trade Organization*, 11 *American U. J. Int'l Law and Policy* (1996) pp. 1-46 (discussing utility of trade sanctions as an instrument of addressing human rights abuses).

<sup>29</sup> S. Charnovitz, *Trade Measures and the Design of International Regimes*, 5 *J. Environment & Development* (1996) p.168.

## LINKING AN MIT HUMAN RIGHTS

16. In order to analyze the propriety of a proposed linkage between human rights and investment policies within an MIT, it is necessary to synthesize the broad literature on linkages between social and economic issues. To do so, this paper advocates the following schematic approach, which divides the reasons for linking – or not linking – different topics within one treaty into four categories<sup>30</sup>:
  1. Conceptual: Linkage supports, or detracts from, the policy rationale behind the two topics to be linked.
  2. Instrumental: Linkage aids, or hurts, implementation of the two topics' objectives.
  3. Political: Linkage aids, or hurts, the political process necessary for successful adoption (at the international and domestic level) of the treaty including both topics.
  4. Institutional: Linkage aids, or hurts, the organization responsible for implementing the treaty including two topics.
17. This framework organizes discussions regarding linkages between an MIT and human rights, and whether particular human rights should, or should not be, linked to an MIT. Of course, the categories are not absolutely discrete, and some factors may appear as important considerations in more than one category. Equally certainly, factors in different categories have significant impact on one another. Nevertheless, this framework does provide a simple organizational scheme for the following discussion.
18. As already indicated, this Paper argues that the balance of the factors listed above weighs in favor of linking human rights to investment policies in an MIT. At this point, having exhorted the MIT's drafters to reach new heights of complexity in their efforts, it is only fair to make an attempt here to make some preliminary suggestions about the form of a future MIT that would create a viable global investment treaty while observing international human rights standards and obligations. To achieve these results, the MIT should follow a multi-layered approach. This approach, drawn from the pathbreaking recent work of UNCTAD on international investment treaties, will be applied to a hypothetical MIT below in order to illustrate value of particular linkages.<sup>31</sup>
19. The MIT should contain provisions that state the treaty's objectives within the context of an international commitment to development and growth toward achieving better human rights. The most effective means of doing so is to allow host States sufficient flexibility to follow their human rights development strategy. To provide this flexibility, an MIT's overall structure must take into account the factual asymmetry between the State parties so that their respective rights and obligations reflect the differences between States at different stages of economic development. Furthermore, the MIT's substantive provisions, and the prescribed methods for their implementation, should include, or at least not prohibit, certain minimum standards of behavior regarding relevant human rights in order to prevent host States from engaging in a race to the bottom or otherwise using an MIT to justify deviation from human rights norms. Specifically:
  1. It must clarify and express its conceptual commitment to protect and promote existing international human rights obligations;
  2. It must ensure that implementing its requirements do not impinge on the protection of human rights;

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<sup>30</sup> This approach is adapted from a framework suggested in S. Charnovitz, *Linking Topics in Treaties*, 19 U.Pa. J. Int'l Econ. L. 329, at 335 (1998).

<sup>31</sup> UNCTAD, *International Investment Agreements: Concepts Allowing for a Certain Flexibility in the Interest of Promoting Growth and Development* (1999).

3. It must increase its political constituency to include human rights advocates in an effective coalition; and
  4. It must adapt its institutional resources to include human rights concerns.
20. Before addressing the merits of these recommendations, it may be necessary to address the inevitable howl of protest from the proponents of trade liberalization regimes (and the already beleaguered lawyers and economists who must make those regimes work). If they view these suggestions as another unwelcome instance of “trade and ...” issues, they only have their own success to blame. The dominance of the free market system after the Cold War’s end and the remarkable success of various international trade regimes in creating viable, vibrant multilateral frameworks naturally attracted the attention of international lawyers of all persuasions. This shift is, in fact, a tribute to the success of the liberalization regime, in that debates in fields as diverse as labor, environmental and human rights law are now cast in terms of their interaction with trade law. The free traders won the war and conquered the planet – now they must demonstrate that they can rule it wisely.<sup>32</sup>

### Conceptual Reasons for Linkage:

21. An instrument should link different topics if their inclusion supports the rationale underlying both topics; conversely, linkage should be avoided when the linkage opposes the policies underlying either topic. Given FDI’s increasing importance in international commerce, it is this area – the environment for FDI – that has become the recent focus of international attention, with the arguments previously used to justify international commerce applied specifically to FDI and the benefits of liberalization. As described more fully below, these arguments all rely on the belief that increased global commerce increases global and national wealth and thus enables greater human rights protection.<sup>33</sup>
22. Economists typically justify international commerce by some version of David Ricardo’s theory of comparative advantages, which claims that a perfectly free system of international trade allows countries to develop their best resources, thus maximizing their (and global) wealth.<sup>34</sup> The frequently unarticulated assumption behind the theory of comparative advantage is that increased wealth leads to improved human existence.<sup>35</sup> More recent and nuanced theories, like game theory and John Ruggie’s “embedded realism” model, whereby nations engage in international trade primarily to advance their own internal liberal policies, essentially flesh out the invisible hand approach by explaining how international commerce simultaneously aids multilateral achievement as well as domestic agendas.<sup>36</sup> This thesis, linking liberalization to increased

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<sup>32</sup> As Dunoff suggests, efforts such as this Paper indicate the victory of “traditional” trade partisans in setting the intellectual agenda. Dunoff, *Trade and ...*, supra note XX, p.768. However, this Paper does not mean to defend or celebrate this victory, but rather attempts to show that even the traditionalist approach to global commerce must heed international human rights obligations.

<sup>33</sup> This justification for international trade is particularly relevant for the Western (i.e., European and American) economic powers that dominate global trade, because of the basis of liberal democratic ideology in liberal (and liberalizing) economic policies, fundamentally stated as the individual’s right of decisionmaking in economic and social activities. F. Garcia, *Trade and Justice: Linking the Trade Linkage Debates*, 19 U. Penn. J. Int’l Econ. L. (1998) pp.391-434, at pp.411-413 and 422-424.

<sup>34</sup> For a succinct description of the various theories underpinning international trade, see J. Dunoff, *Rethinking International Trade*, U.Pa. J. Int’l Econ. L. 347 (1998).

<sup>35</sup> Nichols, *Trade Without Values*, supra note XX, pp. 661-667. Aside from the wealth-generating benefits of trade, Nichols cites the following benefits of international trade which may be extrapolated to international investment: increased international contacts fostered by transboundary trade, supporting international peace; distribution of foreign exchange to needy developing countries; the creation of jobs through foreign investment. *Ibid.*

<sup>36</sup> J. Ruggie, *Embedded Liberalism Revisited: Institutions and Progress in International Economic Relations*, in (E. Adler & B. Crawford eds.) *Progress in Postwar International Relations* (1991) p. 201 (GATT has allowed States to dismantle various barriers to international trade for a variety of internal agendas). See further J. Jackson, *World*

national wealth and implicitly, better human rights protection, is the core of the OECD's MAI, and indeed of any future MIT.

23. Most international economic institutions have recently begun to define their work more explicitly in these terms. The efforts of these institutions are simply reflections of similar concerns expressed in most international economic instruments, as seen in the growing attention to sustainable development and good governance by various Bretton Woods institutions and other multilateral development banks<sup>37</sup>, and the World Trade Organization, which prohibits the use of prison labor and allows measures relating to the protection of human health and natural resources.<sup>38</sup> Even bilateral trade treaties state their purpose in terms of improving economic growth and social development.<sup>39</sup> Other international institutions dealing with economic issues have gone farther in assessing economic performance in terms of its ability to improve a society. At the vanguard of this development has been the UN Development Program, which has created a fuller and more nuanced view of economic development which encompasses not just factors such as national wealth and production, but also health, education and real individual income.<sup>40</sup> Similarly, the much-maligned UN Conference on Trade and Development (UNCTAD) has done much recently in its annual reports on international trade and investment to track not simply the volume of international commerce, but also the distribution of that trade and its real impact on the trading countries. The OECD itself has adopted this approach, couching its arguments in terms of the benefits of trade liberalization on human development.<sup>41</sup>
24. The same basic rationale supports investment treaties; for instance, the OECD justified its drive for investment liberalization thus: "Trade and foreign direct investment are major engines of growth in developed and developing countries alike. ... [W]hen individuals and companies engage in specialisation and exchange, a country will exploit its comparative advantage. It will devote its natural, human, industrial and financial resources to the highest and best uses."<sup>42</sup> In more concrete terms, the OECD argued that "liberalisation can benefit developed and developing countries alike. As is the case for OECD countries, foreign investment brings higher wages, and is a major source of technology transfer and managerial skills in host developing countries. This contributes to rising prosperity in the developing countries concerned, as well as enhancing demand for higher value-added exports from OECD economies."<sup>43</sup> International institutions whose focus is international trade and investment have begun to accept that their missions are intertwined with social considerations, even if these rights are cast not as fundamental rights, but rather as the byproducts or the distant motivations for international commerce.
25. To the extent that increased national wealth improves observation of human rights, this thesis conforms with the duty of States to create the necessary conditions for improving human rights, specifically labor and social rights.<sup>44</sup> Protection of human rights is necessary to ensure the

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Trade Rules and Environmental Policies: Congruence or Conflict?, 49 Wash. & Lee L. Rev. 1227, 1231 (1992). For a brief discussion of the benefits attributed to free trade, see P. Nichols, Trade Without Values, pp.662-667.

<sup>37</sup> G. Handl, *The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development*, 92 A.J.I.L. 642 (1998).

<sup>38</sup> GATT articles XX.

<sup>39</sup> K. Vandeveld, *The Political Economy of a Bilateral Investment Treaty*, 92 A.J.I.L. 621 (1998).

<sup>40</sup> See, for instance, the UNDP's Human Development Report of 1997.

<sup>41</sup> OECD, *Open Markets Matter: The Benefits of Trade and Investment Liberalisation*, Policy Brief No. 6-1998, available at <[www.oecd.org](http://www.oecd.org)>.

<sup>42</sup> OECD, *Open Markets Matter: The Benefits of Trade and Investment Liberalisation*, Policy Brief No. 6-1998, p.1, available at <[www.oecd.org](http://www.oecd.org)>.

<sup>43</sup> OECD, *Open Markets Matter: The Benefits of Trade and Investment Liberalisation*, Policy Brief No. 6-1998, p.3, available at <[www.oecd.org](http://www.oecd.org)>.

<sup>44</sup> On the State's legal obligation to provide these rights, see G.J.H. van Hoof, *The Legal Nature of Economic, Social and Cultural Rights, The Right to Food: From Soft to Hard Law* (1984) pp.6-29.

creation and maintenance of a stable and productive society.<sup>45</sup> Similarly, increased social wealth may lead to improved human rights standards.<sup>46</sup> There is some quantitative correlation between increasing GDP and improving human rights, for instance, which indicates that nations that provide better protection for human rights are generally those countries better at generating wealth.<sup>47</sup> This type of empirical analysis should not be overstated; suffice it to say that there is some economic data that supports the notion that support for human rights may facilitate economic development and trade liberalization, and vice versa. If so – and this is certainly the official line of international economic bodies – the link between international investment and human rights should be encouraged by any trade or investment treaty.

26. The theoretical justification for a link between an investment treaty and the prohibition of internationally criminalized acts is even clearer. The pursuit of profits and the defense of investments has at times led investors – whether States or multinational corporations – to engage in massive atrocities and violation of internationally accepted norms of human rights. Some of the more egregious allegations include the role of various industrialists, financiers and insurance companies in bankrolling, processing and profiting from Nazi rule, Royal Dutch Shell financing the human rights abuses perpetrated by military government of Nigeria, and British Petroleum financing military and paramilitary security forces in Colombia – all instances where investors have reportedly violated basic and internationally agreed upon standards of conduct directly or through cooperation with military forces to maintain or expand their investments. But these examples are never discussed in economic terms, and hence never enter the agenda of economic treaties like an MIT. For this very reason, there is no possible economic justification for maintaining silence on such abuses of basic human rights, and any economic treaty designed for the real world should incorporate a prohibition of violations of basic international human rights standards in order to signal its awareness of the occasional crimes perpetrated by investors and its commitment to stop such acts.
27. At a conceptual level, then, linking investment and human rights within a single international instrument is a matter of stating the sometimes unstated premise that the point of international commerce (and its subset, investment) is improvement of human welfare. That this is – or should be – the goal of all government actions should never be lost to us. So the MIT should be clear about its commitment to this goal and, more important, about how it contributes to achieving this goal.
28. Legislation typically addresses such basic rationale in its preamble.<sup>48</sup> The MIT also needs to state its policy objectives and rationales clearly in its Preamble. These objectives, based on respect for the human rights mentioned above, should be: (1) explicit recognition of the interaction between foreign investment and human rights, stressing the primacy of the latter and an explicit commitment to curbing the negative impact of foreign investment on human rights; and (2) explicit recognition of the differing needs of States at differing stages of economic activity for investments and investment measures.

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<sup>45</sup> The best analysis of the link between high labor protection and high productivity comes from the OECD itself. OECD, *Trade, Employment and Labour Standards: A Study of Core Workers' Rights and International Trade* (1996). For an evaluation of the OECD's report, see S. Charnovitz, *Book Review: Trade, Employment and Labour Standards: The OECD Study and Recent Developments in the Trade and Labor Standards Debate*, 11 *Temple Int'l & Comp. L. J.* (1997) pp.131-163.

<sup>46</sup> W. Meyer, *Human Rights and MNCs: Theory versus Quantitative Analysis*, 18 *Hum. Rts. Q.* (1996) p.368 (quantitative data show slightly positive correlation between FDI and improved human rights). But see J. Smith, M. Bolyard & A. Ippolito, *Human Rights and the Global Economy: A Response to Meyer*, 21 *Hum. Rts. Q.* (1999) p.207 (using data provided by human rights NGOs, showing weak or negative correlation between FDI and human rights observation).

<sup>47</sup> Nichols further notes the correlation between increased national wealth and longevity, and conversely, decreasing wealth and deterioration in public health. Nichols, *Trade Without Values*, supra note XX, p. 666.

<sup>48</sup> Vienna Convention on the Law of Treaties, Art. 31(2), opened for signature May 3, 1969, 1155 UNTS 331.

29. We have already seen that the first objective is already part of the rhetoric of nearly all free traders and international economic regimes. In the case of an investment regime, an MIT should include among its objectives explicit recognition of the contributions which foreign investors can make to economic and social progress in areas such as technology transfer, employment, education and labor rights. The draft MAI, for instance, explained FDI's role in improving human welfare via the following language in its Preamble: "[A]greement upon the treatment to be accorded to investors and their investments will contribute to the efficient utilisation of economic resources, the creation of employment opportunities and the improvement of living standards ... ." <sup>49</sup> Furthermore, among the proposals considered for the OECD MAI's Preamble was one expressing the OECD's "commitment to the Copenhagen Declaration of the World Summit on Social Development and to observance of internationally recognized core labor standards, i.e. freedom of association, the right to organize and bargain collectively, prohibition of forced labor, the elimination of exploitative forms of child labor, and non-discrimination in employment."<sup>50</sup> The basic human rights discussed in this Paper, which rely on already existing international law, have even stronger normative legitimacy than the somewhat hortatory Copenhagen Declaration. But at the very least, these statements show a growing responsiveness to sentiments consistently expressed by the architects and leaders of globalization and its supporting structures.<sup>51</sup>
30. The second objective, which is aimed at creating a more realistic and nuanced view the global economic playing field, is more easily found in existing economic interests. UNCTAD has collated some of the better samples from the myriad international treaties that realistically address the asymmetry that exists between various parties to a multilateral economic treaty and the impact of this asymmetry on their ability to meet their obligations to their people and their international partners.<sup>52</sup> For instance, witness the Preamble to the Agreement on Trade Related Investment Measures ("TRIMS"), which states its objective as: "Desiring to promote the expansion and progressive liberalization of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly those developing country Members, while ensuring free competition..."<sup>53</sup> Numerous other examples exist, all with the intention of articulating the intention of multilateral economic treaties to increase global liberalization in order to assist developing countries. Any MIT should at least include similar clear explanation of its objective in improving global wellbeing.

*Instrumental reasons:*

31. While economists and human rights lawyers may agree that their ultimate goal is the creation of a better society where people lead better lives, the two groups diverge sharply over the means necessary for bringing about these improvements. The position of classic economic liberal policy, at the risk of some simplification, is that the market's invisible hand is the most effective organizer and improver of societies, and that therefore any government policies that interfere with the market's operation must be minimized or eliminated. This argument or variations upon it typically militate against linkage between human rights and economic treaties because economists view these regulations as having the same distorting effect as any other State intrusion upon the market.<sup>54</sup> On the other hand, the international human rights regime relies on

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<sup>49</sup> OECD, Draft MAI, Preamble paragraph 3 (1998).

<sup>50</sup> OECD, Draft MAI, Preamble, p. 9 (1998).

<sup>51</sup> For a survey of the recent shift toward accepting social obligations for commercial interests and entities, see C. Avery, Human Rights in a Time of Change, available at <[www.multinationals.law.eur.nl](http://www.multinationals.law.eur.nl)>.

<sup>52</sup> UNCTAD, International Investment Agreements, supra note XXX, pp.7-10.

<sup>53</sup> TRIMS, CITE. [Emphasis added].

<sup>54</sup> See Stephan, Barbarians Inside the Gate, supra note XX.

State governments to implement and ensure labor rights, social rights, and other basic human rights.

32. Naturally, the market's invisible hand sometimes clashes with the State's duty to lend a helping hand, and it is clear that economic policies have important, if not paramount, impact on the realization and protection of human rights. To explain the political ramifications of the clash over the State's role in ordering social resources, "public choice" theory casts State economic policy as a subset of political competition over resources between various public sectors – one which naturally favors the rich and mighty.<sup>55</sup> In the context of liberalizing international investment it is not enough for States simply to deregulate the investment environment. States must also protect investors, foreign or otherwise, for instance by assigning resources to judicial enforcement of foreign patents in the case of investors in intellectual property. The State must actively create the necessary legal and physical infrastructure to support foreign investors. Even more active is the role of States when they attract FDI through incentives and tax breaks.
33. Government inaction has now also been recognized as having non-neutral effect; for instance, lax labor standards constitute, in practice, a subsidy of some businesses – the phenomenon of "social dumping" – which seriously skews the market.<sup>56</sup> Any single country that tried to enforce higher labor standards would risk losing out to less scrupulous competitors. This phenomenon, the "race to the bottom," continues to tempt States to weaken their protection of human rights in order to maintain or increase their competitive advantage.<sup>57</sup> It is presumably the same profit motive that drives some investors to partake of ventures that directly or indirectly rely benefit from internationally prohibited acts, such as the use of slave or forced labor, forced resettlement of populations, or the threat or application of force. Only collective action, enforced by a multilateral regime, could address this type of "market distortion." Thus any MIT must include devices that prohibit market distortions caused by (unethical) social policies of its member States – precisely the role performed in this context by international human rights standards.
34. The OECD's Guidelines for Multinational Enterprises, considered the organization's primary instrument regarding its social responsibility, puts it this way: "The common aim of the Member countries is to encourage the positive contributions which multinational enterprises can make to economic and social progress and to minimize and resolve the difficulties to which their various operations may give rise."<sup>58</sup> This statement also encapsulates the other instrumental reason supporting linkage of human rights to an investment liberalization treaty: such linkage in fact aids the implementation of liberal policies by decreasing negative social responses possibly caused by liberalization. For instance, the OECD has long recognized that liberalization can lead to social instability which provokes protectionist measures from national governments. To avoid this protectionist urge, the OECD advocated maintaining important social values, such as education, job training, taxation, social security nets, job provision, and health protection.<sup>59</sup> "In

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<sup>55</sup> More generally, economists have long admitted that the "free market" as such does not exist, but is rather a construct of particular forces within society that use social resources to create and protect a particular institution wherein the State minimizes its direct involvement. P. Stephan, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 *American U. J. Int'l Law & Policy* (1995) p. 745; J. Bhagwati, *Political Economy and International Economics* (1991).

<sup>56</sup> D. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 *Yale J. Int'l L.* 361, 379 (1995).

<sup>57</sup> While this reasoning may seem common sensical, it is not at all certain what impact regulatory measures have on comparative advantage. On the link between comparative labor standards and trade competitiveness, see Bhala, *Clarifying the Trade-Labor Link*, 37 *Columbia J. Transnat'l Law* (1998) p. 12, pp.17-28. On the impact of environmental regulations on competitiveness, see R. Stewart, *Environmental Regulation and International Competitiveness*, 102 *Yale L. J.* (1993) p. 2039.

<sup>58</sup> OECD, *Guidelines for Multinational Enterprises*, Introduction, Para. 2 (1991).

<sup>59</sup> OECD, *Open Markets Matter: The Benefits of Trade and Investment Liberalisation*, Policy Brief No. 6-1998, p.6, available at <[www.oecd.org](http://www.oecd.org)>.

sum,” the OECD argued, “a balanced mix of policies is needed to reinforce adaptive capacity in the face of all structural changes, including those stemming from trade and investment liberalisation.”<sup>60</sup> Clearly, many, if not most, of the “mix of policies” identified by the OECD as necessary for the smooth liberalization of a national economy implicate human rights such as the right to education, social security, health, and labor protection.<sup>61</sup> The OECD’s conclusions should not be viewed as anecdotal, but rather as a distillation of the approach of the dominant international liberal economic paradigm to issues inherent in liberalization.<sup>62</sup>

35. Aside from these purely utilitarian arguments in favor of linkage, it is important here to point out another natural type of linkage between an MIT and human rights. This type of issue refers to what may be called “stealth linkages” – that is, problems of omission in a treaty where some economic principle directly interacts with human rights principles but is left unaddressed. A prime example would be a “liberalizing” prohibition of regulations aimed at redressing historically discriminatory employment practices – that is, affirmative action measures. For instance, the OECD MAI prohibited employment requirements and performance requirements that impinged upon investors’ right to hire as they pleased.<sup>63</sup> Such a rule would of course have a tremendous impact on existing affirmative action efforts pursuant to international obligations.<sup>64</sup> Similarly, investment provisions that limit the State’s ability to craft domestic measures for providing social human rights – the protection and promotion of the lots of minorities, women, children – would be threatened by stealth linkages.
36. The two basic instrumental reasons in support of linking international investment and human rights within the same treaty – avoiding negative effects of investment regulation and strengthening the positive effects – must be viably implemented in a future MIT, not just because they support international human rights obligations but also because they create the social stability necessary for economic development. As discussed in the context of conceptual reasons for such linkage, the MIT must explicitly state its goal of improving human welfare by protecting and promoting human rights. Such preambular statements alone, however, are insufficient because they are hortatory and unenforceable. The MIT’s substantive provisions must reflect the goals stated in the Preamble, basically by locking in existing international obligations against downward pressure from investment liberalization measures, and maintaining flexibility for States to improve their human rights protection within the liberalized investment regime. While extensive examination of the specific treaty provisions necessary for implementing a liberal investment regime while observing international human rights standards is beyond the scope of this Paper, below I will sketch some the basic requirements of this process.
37. In its work on international investment agreements, UNCTAD has identified the issues that typically comprise the substance of investment regimes, and some of the methods used to implement them.<sup>65</sup> In the absence of a concrete MIT to focus on, this Paper adopts UNCTAD’s

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<sup>60</sup> OECD, *Open Markets Matter: The Benefits of Trade and Investment Liberalisation*, Policy Brief No. 6-1998, p.6, available at <[www.oecd.org](http://www.oecd.org)>.

<sup>61</sup> For instance, the United Nations Development Programme’s influential Human Development reports measure development not just in terms of national wealth, but using a composite index in three fundamental categories: life expectancy (health), educational attainment and income. UNDP, *Human Development Report 1996* (1996). See also H. Steiner, *Social Rights and Economic Development: Converging Discourses?*, 4 *Buffalo H. R. L. Rev.* 24, 35-40 (1998).

<sup>62</sup> For a more general discussion of the non-trade social values inextricably linked to discussions of liberalization, see J. Jackson, *World Trade Trading System: Law and Policy of International Economic Relations*, pp.16-18 (1989) (discussing market inefficiencies caused by social problems such as poor education, poor distribution of wealth, and other social problems).

<sup>63</sup> OECD, *Draft MAI*, Ch.III, *Employment Requirements* (p.17) and *Performance Requirements* (p.18, at 21).

<sup>64</sup> Y. Klerk, *Working Paper on Article 2(2) and Article 3 of the International Covenant on Economic, Social and Cultural Rights*, 9 *Hum. Rts. Q’ly* (1987) p.250, p.265 (1987).

<sup>65</sup> UNCTAD, *International Investment Agreements*, supra note XX, pp.10-20.

approach to discuss the general content of an MIT linked to human rights. The first issue is the correct range of the MIT, i.e., its breadth in covering what constitutes investment, how extensive the protection of investment should be, and what acts impinge on this protection. The second issue is the substantive heart of any MIT, namely the notion of nondiscrimination as embodied in the doctrines of national treatment and most favored nation treatment. The third and final issue is the implementation mechanism used to enforce the agreed upon substance of the treaty, typically through a dispute settlement mechanism.

### *The MIT's Range*

#### a. The definition of investment

38. If development in general and the advancement of human rights in particular are to be considered goals of an MIT, then the MIT should define what exactly it means by investment. As I have discussed already, the argument that the MIT benefits countries is that increased FDI, especially to developing countries, helps their development and increases wealth generally. As discussed above, there is some empirical evidence for this (although that too is disputed, as I have indicated), and at any rate this argument is the only one advanced by economists in order to justify including developing countries in an MIT. But there is no evidence that non-FDI type investments are also beneficial, or at least benign, for developing countries. Portfolio investments, for instance, are subjects of immense controversy for their value in fostering financial development, as demonstrated in the financial crisis still enveloping Asia and Latin America. The particular problem associated with portfolio investments is that, unlike in the case of FDI, the foreign investor has no lasting stake in the welfare of the host State and therefore is more likely to focus on short-term gains instead of the long-term or even medium term gains that proponents of trade liberalization ascribe to foreign investment. The IMF for instance focuses on this difference by defining FDI as “international investment that reflects the objective of a resident entity in one economy obtaining a lasting interest in an enterprise resident in another economy ... The lasting interest implies the existence of a long-term relationship between the direct investor and the enterprise and a significant degree of influence by the investor on the management of the enterprise.”<sup>66</sup> The lower degree of control by the foreign investor lends itself more easily to investment in or profiteering from violations of international human rights standards, essentially negating the rationale for liberalizing this type of international investment.<sup>67</sup> Similar considerations apply to calls for liberalization (and extension of protection to) exploratory or speculative investments, otherwise known as pre-investment protection. While FDI investors with established stakes in a community may be regulated by market intangibles (i.e. consumer loyalty, reputation, management stability), these mechanisms would hardly apply to prospective investors, who could contest government action with very little concretely at stake for the investor.<sup>68</sup> Any MIT must define its range of protected investments narrowly to protect host States from the negative impact of short-sighted foreign investors.

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<sup>66</sup> International Monetary Fund, *Balance of Payments Manual: Fifth Edition* (1993), quoted in UNCTAD, *International Investment Agreements*, supra note XX, p. 11.

<sup>67</sup> Many bilateral investment treaties between developed and underdeveloped countries define investment broadly to include direct and indirect investment by foreigners, as well as intellectual property rights. See K. Vandeveld, *United States Investment Treaties, Policy and Practice* (1992).

<sup>68</sup> Chris Avery suggests that these intangible forces are in fact quite powerful in directing investors toward better human rights protection. C. Avery, *Human Rights in a Time of Change*, supra note XX.

b. Definition of expropriation

39. The definition of expropriation is a key concept for any MIT, since it will establish the range of actions from which the MIT seeks to protect foreign investors. In the current global political climate, expropriations are not the proclamations of revolutionary independence, as witnessed after the revolutions in Cuba and Iran, for instance, but rather matters of regulations and “creeping expropriation.” A definition that does not take into account national goals competing with trade liberalization will tend to generate legal conflicts, whether in developed or developing countries. In the extreme, any national human rights effort that would direct private capital into particular areas could be considered as a taking by private investors, since their interests would be infringed upon. Unfortunately, this extreme vision seems borne out at least in part by experience from NAFTA, whose broad anti-expropriation language has given rise to a number of lawsuits of dubious provenance (and certain controversy) in which investors successfully challenged government regulations intended to protect human health and the environment. Without getting into the merit of these particular cases, it is important to note that the NAFTA jurisprudence indicates at least potential problems, especially in poor countries where MNCs with extensive resources could seriously challenge weak governments. To address this problem, any MIT must include a careful definition of expropriation, to distinguish it from legitimate (i.e., nonprotectionist) government regulation. Another crucial mechanism for ensuring that foreign investors do not use an MIT as a sword against legitimate human rights policies (instead of a shield against purely expropriatory acts) is to allow regulations for the “public purpose” so as to allow sufficient flexibility to governments meeting their human rights obligations.<sup>69</sup>
40. A less direct method of preserving State flexibility in meeting human rights obligations is to carve out these State actions from the purview of the MIT either through treaty exceptions or State derogations. For instance, recognizing the potential clash between liberalization demands and legitimate affirmative action schemes, the OECD MAI allowed limited exceptions (only) for anti-discrimination provisions.<sup>70</sup> (other exceptions were included in Annex B to the MAI, which was not incorporated into the final available draft version of the MAI<sup>71</sup>). In order to maintain flexibility, the MIT must include such derogations as maintenance of public order, observance of human rights obligations, and prohibition of human rights violations. One method of providing for investor protection and transparency would be to use the standstill and rollback method already familiar to economic treaties. That is, governments would identify a number of human rights policies that would be locked into place as exceptions to the MIT’s expropriation protection. Governments would also identify a number of human rights policies that would require alteration over time, and could be invoked only following due process of law (i.e., all the basic rules governing the legality of government takings).<sup>72</sup>

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<sup>69</sup> On the public purpose element of State discretion, see P. Muchlinski, *Multinational Enterprises and the Law* (1995), p.504.

<sup>70</sup> OECD, Draft MAI, Ch.III, fn. 14 (“It is understood that this article [Employment Requirements] would not interfere with domestic anti-discrimination and labour laws.”); fn.24 (“Nothing in this paragraph [prohibiting performance requirements demanding hiring of a given level of nationals] shall be construed as interfering with programmes targeted at disadvantaged regions/persons or other equally legitimate employment policy programmes.”)

<sup>71</sup> OECD, MAI, Sec. IX, fn.11: “It was agreed to withhold the drafting of the introduction of ‘Annex B’ until the Negotiating Group had taken a political decision on the status and coverage of Part B of the Article. Moreover, a number of delegations felt that the wording of such an introduction might need to be drafted in a limited way (ie. To cover only cases of privatization or demonopolization.”)

<sup>72</sup> See generally O. Schachter, *Compensation for Expropriation*, 78 *Am. Journal of Int’l Law* (1984), p.121.

## *Nondiscrimination*

41. The core of any MIT are the concepts of national treatment and most favored nation treatment (MFN), whereby host States commit themselves to provide a level playing field for foreign and national investors. Unfortunately, these concepts do not take into account differences in power among the players on this level playing field; powerful foreign investors can thus benefit at the expense of weaker native competitors. When these weaker groups are those whose protection and promotion is obligatory under human rights law, the doctrine of nondiscrimination becomes problematic. The MIT must be clear that it does not impinge on legitimate affirmative action programs, for instance as seen above in the OECD MAI. An alternative would be to include a built-in reservation in an MIT for development goals pursuant to international human rights obligations, thereby ensuring a level playing field by adopting universally applicable standards.
42. Performance requirements are the primary national tools for promoting contribution, and prohibiting damage, by FDI. The MIT should explicitly allow certain performance requirements designed to allow countries, especially developing countries, to develop their national economies, as long as the rules were applied equally following the principle of nondiscrimination. The OECD MAI had gone some ways in this direction, pointing out in paragraph 4 of Section III that Parties could take measures necessary to protect human, animal or plant life or health or measures necessary for the conservation of living or non-living exhaustible natural resources. The GATT Agreement on Subsidies and Countervailing Measures (ASCM), for instance, allows subsidies for research, but more significantly, for promoting development in “disadvantaged regions” and for one-time adaptation of existing facilities to meet new environmental requirements.<sup>73</sup> In this sense, the MIT should not go beyond the range of limits on performance requirements established by TRIMS, which, for instance, allows requirements for the employment of a given level of nationals, establishment of joint ventures with nationals, and a minimum level of local equity participation.<sup>74</sup> A similar approach, more explicitly tied into existing human rights standards, is necessary for an MIT.<sup>75</sup>
43. Furthermore, to counteract the negative effects of nondiscrimination standards, the MIT should adopt an “in like circumstances” standard – that is, providing the context for comparing different competitors in different fields. Problems arise for instance when a powerful MNC is compared with a struggling local enterprise and treated the same way, thus not creating a level playing field but instead enforcing existing inequalities. The central point again is that the national treatment rule must not be applied against legitimate human rights goals. For instance, subsidies or investment incentives are a major tool by which governments can reallocate resources to correct the market’s failure when its prices and profitability do not accurately reflect social benefits.<sup>76</sup> Governments typically use subsidies to encourage particular market sectors, or industries, or geographic regions. Such policies may run afoul of a proposed MIT by favoring local investment over FDI, thus violating the national treatment clause. Any MIT with international aspirations must include some method of distinguishing between admissible subsidies that pursue legitimate national development goals and impermissible protectionist measures.
44. On the flip side, many governments, especially in the developing world, actually favor FDI over local investment by subsidizing – directly or through tax benefits – foreign MNCs. Another issue associated with investment incentives is preferential treatment for foreigners in order to attract FDI, for instance by lowering applicable social and labor standards – the race to the

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<sup>73</sup> GATT ASCM, Article 8.2(b), (1994).

<sup>74</sup> A.V. Ganesan, *Development Friendliness Criteria for a Multilateral Investment Agreement*, 6 *Transnational Corporations* (Dec. 1997) 135, 139.

<sup>75</sup> The MAI’s final draft did not include a final decision on this issue, instead opting to postpone the issue to further “MAI disciplines” regarding positive discrimination. MAI, Chapter III, Investment Incentives, Paragraph 3, p.48.

<sup>76</sup> M. Daly, *Investment Incentives and the Multilateral Agreement on Incentives*, 32 *J. World Trade* 5 (1996).

bottom. Again, an MIT must prohibit such measures, using a “not lowering measures” clause perhaps similar to NAFTA Article 1114(2), which states:

Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment or an investor.

45. Similar language, designed to protect human rights from competitive forces, is necessary for an MIT.

### *Implementation mechanisms*

#### a. Conflict of obligations

46. Obviously the impact of an investment liberalization regime on human rights obligations will depend much on how the liberalization schemes of an MIT are implemented. At the treaty level, the MIT must create at least a mechanism for resolving disputes between economic provisions and existing human rights obligations. Technically, following article 30 of the Vienna Convention, a new MIT could prevail over any conflicting older human rights treaty obligations, thus requiring some sort of conflict resolution mechanism that would protect human rights obligations from unexpected or unintended (not to mention expected and intended) intrusion by an MIT.<sup>77</sup> A useful example of a beginning point is NAFTA’s side agreement on the environment, which is designed to raise environmental standards and to create a dispute settlement mechanism to address failures to enforce environmental laws.<sup>78</sup> NAFTA clarifies that certain multilateral environmental agreements take precedence over NAFTA<sup>79</sup>; the same approach should be used for human rights obligations under an MIT.

#### b. Dispute settlement mechanism

47. Obviously, a great deal of the impact – positive or negative – of an MIT would turn on how its liberalization measures were implemented and who got to resolve conflicts between investment liberalization measures and human rights obligations. The OECD MAI’s dispute settlement mechanism (“DSM”) was a lightning rod for criticism because its unprecedented wide reach exacerbated the treaty’s perceived shortcomings.
48. Presumably, any MIT that allowed trade measures taken pursuant to human rights obligations as exceptions to its liberalization rules would use language similar to GATT articles XX(b) and (g), and apply the same kind of test for establishing the necessity of the trade measures.<sup>80</sup> Let me

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<sup>77</sup> J. Schultz, *Environmental Reform of the GATT/WTO International Trading System*, 18 *World Competition* (1994) p. 77 at p.104, cited in T. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 *American Journal of Int’l Law* (1997) p. 268-313, at p. 283.

<sup>78</sup> S. Miller, *NAFTA: A Model for Reconciling the Conflict Between Free Trade and International Environmental Protection*, 56 *U.Pitt. L.Rev.* 483 (1994), cited in T. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 *A.J.Int’l L.* 268, at 282 (1997).

<sup>79</sup> *Ibid.*, at 283.

<sup>80</sup> For instance, the MAI offered a possible protective paragraph to its Performance Requirements section following GATT. This provisional paragraph 4 read: “Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment, nothing in paragraphs 1(b) and 1(c) shall be construed to prevent any Contracting Party from adopting or maintaining measures, including environmental measures:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

generalize: GATT panel decisions regarding the applicability of certain trade measures under the article XX(b) exception for the protection of human, animal or plant life and health use a three step analysis: (1) is the substance of the measure the protection of health?, (2) is the measure necessary to protect health?, and (3) does the measure avoid arbitrary discrimination?<sup>81</sup> The trouble with this approach has been that in practice, the trade lawyers applying this test have interpreted “necessary” as “least trade restrictive,” perhaps reflecting their priorities and their understanding of the regulatory framework for environmental protection. If so, any future MIT’s DSM would be wise to move away from the GATT’s unduly restrictive interpretation<sup>82</sup> and instead adopt a more lenient approach, utilizing the views of human rights experts, who can point out that “necessary” should be read as “reasonably necessary,” and should not be the least trade restrictive approach.

49. Furthermore, in order to provide States the flexibility necessary to balance internal human rights obligations with international liberalization schemes, an MIT should exempt certain provisions from review by the DSM based on their human rights content.<sup>83</sup> Under this approach, an MIT would specify certain criteria to establish safe havens for existing and developing human rights treaties. A useful mode, again from the environmental discussion, would be something similar to article XX(h) of the GATT that creates an exception for trade measures imposed pursuant to international commodity agreements (1) automatically, if they conform to enumerated criteria or (2) on an ad hoc basis, if agreed to by GATT members.<sup>84</sup> A similar system for human rights obligations is easy to envision in an MIT.
50. A more effective measure would be to increase the expertise of any MIT’s DSM to enable it to examine human rights issues, for instance by the creation of joint bodies, i.e. with ILO and UN Commission on Human Rights.<sup>85</sup> However, as several commentators have pointed out, such a system would face opposition from both the trade community – which would resent the intrusion of human rights values into their system – and the human rights community – which would fear the loss of control over their hard-won protection to those with different priorities.<sup>86</sup>

## Political Reasons

51. The conceptual issues categorized as theoretical or instrumental find their voice through different social and governmental groups, and treaty linkages are frequently necessary to build coalitions in order to make liberalization treaties acceptable to various domestic or international constituencies. On the other hand, linkages sometimes damage a treaty by including topics unacceptable to various important constituencies. In the context of an MIT, for instance, it is likely (as was the case with the OECD MAI) that governments in newly developed countries, such as Mexico, South Korea and Brazil, would view human rights regulations, especially those regarding labor relations, as inimical to their economic development plans, which typically

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(b) necessary to protect human, animal or plant health;

(c) necessary for the conservation of living or non-living exhaustible natural resources. OECD, MAI, Ch.III, Performance Requirements, p. 23.

<sup>81</sup> Schoenbaum, at 276, citing Tuna/Dolphin III.

<sup>82</sup> For summary of protests following from this interpretation, and generally, Trade Without Values for criticisms of this approach.

<sup>83</sup> P. M. Nichols, *Trade Without Values*, 90 Northwestern Law Review 658, at 660-661 (1996)

<sup>84</sup> R. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, in 2 Fair Trade and Harmonization 95 (1996), cited in Schoenbaum, at 283-284.

<sup>85</sup> D. Ehrenberg, *From Intention to Action: an ILO-GATT/WTO Enforcement Regime for International Labor Rights*, in Human Rights, Labor Rights, and International Trade (Lance Compa and Stephen Diamond, eds), p.163 (1996).

<sup>86</sup> *Ibid*, p.403.

involve the attraction of massive private FDI.<sup>87</sup> On the other hand, in the Western democracies, where the free trade coalition is fairly narrow, an MIT would have to rely on support from important groups pushing specific aspects of the human rights agenda, i.e., labor rights, non-discrimination, environmental and health protection, and sustainable development. The balance ultimately struck between these opposing tendencies will establish the existence and strength of any linkages between human rights and an MIT. On the whole, however, given the other reasons favoring linkages, the existing legal obligations of States in terms of human rights protection, and the empirical evidence connecting better human rights protection and economic development, it is likelier than not that human rights, to some degree, will be linked to any investment treaty with a large membership.

52. Treaties are signed by States, and, as Prof. Nichols has pointed out on the domestic front, “to the extent national governments are in some measure democratic, their abilities to support an international trade regime depend on marshaling popular support.”<sup>88</sup> Especially in the major Western trading countries (which are all liberal democracies), human rights in general, and particular subtopics such as labor rights and women’s rights, have strong political constituencies that will block any liberalizing trade treaty unless their concerns are met.<sup>89</sup> We have already discussed in terms of instrumental reasons the value of linkages in minimizing social disruption caused by liberalizing acts, and thus increasing the acceptability of an MIT. An example of a successful linkage in an international economic treaty propelled by domestic political concerns comes from the GATT, which particularly allows trade barriers in some instances of domestic policies designed to minimize job loss due to international competition – a factor crucial for the GATT’s acceptance.<sup>90</sup> The linkage between international economic obligations and domestic politics was even clearer during the debate surrounding NAFTA, which addressed concerns about its impact on labor and environmental regulation in its Transitional Adjustment Assistance Act.<sup>91</sup> The necessity of drafting an MIT with sufficient linkages to satisfy domestic constituencies was most apparent in the OECD’s failed MAI, where one factor for the treaty’s demise was the OECD’s inability to attract the support of labor and environmental groups.<sup>92</sup> As international economic institutions become better known as important international players, it is certain that they will also become more vulnerable to political pressures emanating from within their member States, and any future MIT must include linkages that respond to these pressures.
53. While linking human rights to an investment treaty may increase the treaty’s domestic and international chances of acceptance, linkages can also have the opposite effect in some instances. Politicizing economic treaties by linkages with social issues may lead to economically suboptimal results.<sup>93</sup> Politically, also, linkages can cause problems by seeming to provide a pretext for increased governmental interference.<sup>94</sup> The OECD MAI lost support from the business lobby in

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<sup>87</sup> These countries opposed the inclusion of binding labor standards in the MAI. At the first Ministerial Conference of the WTO discussions regarding a social clause, proposed by the U.S. and some other developed countries, were blocked by a number of developing countries. Rhala, *Clarifying the Trade-Labor Link*, p. 31. Proposals for including core labor rights in the WTO system, for instance, have met with resistance from East Asian economies who claim that such moves constitute hidden protectionism. Ehrenberg, *supra*, at p. 403. See, for instance, M. Richardson, *A Warning on Trade Talks: Discord Threatens Seattle Meeting, Asians Say*, *International Herald Tribune*, Oct. 23, 1999, p.13.

<sup>88</sup> P. Nichols, *Trade Without Values*, 90 *Nw. U. L. Rev.* 658, 702 (1996) (footnotes omitted).

<sup>89</sup> On the role of NGOs in molding international economic policy as regarding environmental matters, see H. French, *The Role of Non-State Actors*, in *Greening International Institutions* (J. Werksman, ed.), p. 251 (1996).

<sup>90</sup> Dunoff, *Rethinking International Trade*, 372, citing Ruggie, *Embedded Liberalism*, at 399.

<sup>91</sup> On the role of NGOs, especially environmental NGOs, in first opposing and then tacitly supporting NAFTA, see D. Esty, *Greening the GATT: Trade, Environment and the Future* (1994).

<sup>92</sup> Huner, xxXXXXX.

<sup>93</sup> F. Roessler, *Domestic Policy Objectives and the Multilateral Trade Order*, in *The WTO as an International Organization* 226 (A.E. Krueger ed., 1998).

<sup>94</sup> For greater development of this theme, see J. Dunoff, “Trade and?: Recent Developments in Trade Policy and Scholarship – And Their Surprising Political Implications,” 17 *J. Int’l L. bus.* 759 (1997).

part because of the possibility that the document might include some labor and environmental obligations.<sup>95</sup> In a similar vein, the business community, and the main home States of this community, had previously demonstrated their ability to thwart an international economic treaty during negotiations in the 1970s and 1980s over the drafting of a UN Code of Conduct for Transnational Enterprises attempting to combine a regime of investor protection along with guidelines on investor obligations.<sup>96</sup> The UN's effort was a victim of the last gasps of the Cold War ideological struggle and the effort to initiate a New International Economic Order, but the evidence suggests that the different constituencies involved in draft the Code actually agreed on many substantial points, including the application of some obligations to the business community.<sup>97</sup> While the business lobby is likely to continue resisting a strong human rights linkage, the experience of the UN Code also demonstrates that in the face of significant political pressure, or in the pursuit of significant gains such as strong investor protection, business interests will agree to some linkages. The UN's experience in this ultimate attempt at linkage may once again prove useful if an MIT is negotiated in the context of the WTO or another UN body. It is a measure of the political maturity of the business community to see whether it will use the nearly universal acceptance of free market principles as an occasion to accept greater responsibility, or rather simply as a position of power from which to dictate one-sided demands.

### **Institutional reasons**

54. Linking different topics in one treaty, aside from theoretical and political issues, affects the institutional framework of that treaty. Treaty secretariats, like all bureaucratic organizations, typically share a broad institutional ideological framework. The success or failure of a linkage within a treaty depends on whether a given treaty secretariat can, and will, benefit or suffer from the linkage. It is clear that linking human rights and investment issues in the context of an MIT will raise serious and important institutional problems. But, as argued below, these problems are not intractable, and are outweighed by the benefits of some degree of linkage. Furthermore, and perhaps ultimately, the overwhelming success of the liberal trade model and the elevation of economic science as determinants of international relations demand that economic treaties and their secretariats address a diverse array of noneconomic problems in lieu of any alternative fora for addressing these problems.
55. Economists, as well as social activists like environmental and labor NGOs seem to agree that economic institutions are not the best places to address social issues. Social activists have criticized the inability or disinclination of economic bodies like the GATT/WTO, the World Bank, and the IMF to address social issues. In partial agreement, the GATT/WTO secretariat has frankly admitted its inability to review and monitor social issues.<sup>98</sup> Traditional liberal economists defend the sanctity of trade organizations on ground of an institutional version of comparative advantage, arguing that trade bodies do not have the expertise or resources to tackle a variety of environmental, labor and human rights concerns, and that there are already international organizations dedicated to addressing these social concerns.<sup>99</sup> In short, to borrow a phrase from one international trade lawyer, overreaching through linkages between human rights and investment issues might turn an MIT into an economic Kellogg-Briand pact, and the MIT's secretariat into an economic League of Nations.<sup>100</sup>

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<sup>95</sup> Huner.

<sup>96</sup> Muchlinski

<sup>97</sup> Muchlinski.

<sup>98</sup> J. Dunoff, *Trade And:* , p. 759.

<sup>99</sup> See, for instance, the statement by a group of economists in 1997 in favor of focusing trade liberalization organizations on trade issues and addressing human rights in other international bodies. S. Charnovitz, *Linking Topics*, p. 341, 342, fn. 48.

<sup>100</sup> D. Palmetier, *International trade Law in the Twenty-First Century*, 18 *Fordham Int'l L. J.* 1653, 1657 (1995).

56. These arguments, while important to consider, only go so far. First, as Prof. Charnovitz has pointed out, arguments for the institutional sanctity of economic organizations beg the question of where to raise issues common to the trade and to the human rights discussion. The reason that trade bodies have increasingly faced pressure for linkages to social issues is that there are no other legitimate alternatives.<sup>101</sup> Witness, for instance, the UN's ECOSOC, which has no tangible influence on the conduct of international or domestic economic policy.<sup>102</sup> Even the ILO lacks any input on international trade policy.<sup>103</sup> Second, an alternative forum for analyzing the intersection of economic and human rights policies would immediately face problems of competing jurisdiction with economic bodies. For example, it is unclear what international body would rule on the validity of new affirmative action policies aimed at increasing women's participation in the workforce, if such policies seemed to contravene economic liberalization mandated by an MIT. Third, and perhaps most simply, the problems of institutional expertise and the complexity of linked issues apply equally strongly to any human rights body. Issues involving both human rights and investment policies must be addressed somewhere, and the current predominance of economic bodies marks them as the natural fora for addressing these problems. There has already been a large amount of work performed on linkages between trade treaties and social issues, and it makes imminent sense to discuss these issues when all the economists are gathered already, instead of breaking up such discussions artificially. If this is an inconvenience for economic bodies and economists, it is the price of their own success in setting much of the current international agenda.
57. Linkage of social and economic issues not only makes sense from a political point of view, but also addresses some of the public choice criticisms directed at typically opaque and undemocratic international economic institutions.<sup>104</sup> All international bodies rely to some extent on outside groups for important expertise and information support. For instance, the WTO dispute resolution body received information from business lobbies as well as NGOs. However, And in response to arguments, mentioned above, that human rights NGOs. Business interests influence the WTO not just directly, but also through their home States, as most clearly demonstrated in the Reformulated Gasoline Dispute between the U.S. and Venezuela, which actually was a dispute between the American Citgo company versus the Venezuelan national petroleum company.<sup>105</sup> Linking human rights with an MIT would require similar involvement by NGOs involved in the monitoring of human rights would enhance an MIT secretariat's resources by providing information and analysis. It is true that, as many opponents of linkage argue, that many human rights NGOs are in practice hostile to economic liberalization efforts and would use their well-organized interest groups to exert a disproportionately protectionist impact on economic organizations.<sup>106</sup> However, this influence would be more than counterbalanced by the influence of the business community, and, at any rate, this kind of interest group lobbying is an acceptable and necessary part of the operating procedure of any large organization with multiple constituencies.
58. Institutional constraints are among the reasons most often trotted out by opponents of linkages between trade and social policies, for instance by the OECD during the MAI debate, and even at the moment in rejecting calls for including human rights considerations in the OECD

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<sup>101</sup> Charnovitz, *Liking Topics*, p. 342.

<sup>102</sup> ECOSOC's Subcommittee on the Prevention of Discrimination and the Protection of Minorities, for instance, has in the past few years issued a number of strongly worded statements on the negative impact of globalization on human rights issue, all to no apparent attention, much less avail.

<sup>103</sup> The WTO mandate includes provisions for consultation with the ILO, though to date no such consultation has taken place. XXXXX

<sup>104</sup> D. Esty, *Linkages and Governance: NGOs at the World Trade Organization*, 19 U.Pa. J. Int'l. Econ. L. 709, 719 (1998).

<sup>105</sup> J. Dunoff, *NGO Participation*, p. 448-450.

<sup>106</sup> This argument, applied specifically to the WTO, appears in P. Nichols, *Extension of Standing in World Trade Organization Disputes to Nongovernment Parties*, 17 U. Pa. J. Int'l Econ. L. 295 (1996).

Guidelines. While some of the arguments against linkages represent genuine considerations of bureaucratic scale and institutional resources, and thus should be carefully heeded by all proponents of linkages, other arguments, such as those claiming some kind of mission sanctity for liberalizing institutions, merely reflect the laager mentality of economists circling their wagons against a host of real and imagined antiliberal forces. But having won the battle for the hearts and souls of the world's governments convincingly, economists should now open up the circle and adopt a more inclusive attitude. They have created strong, viable institutions uniquely positioned to address some of the most important problems facing the globe. Sharing these institutions is not a sign of weakness, but rather of strength.

## **SOME CONCLUSIONS ABOUT LINKING HUMAN RIGHTS AND INVESTMENT**

59. The different types of reasons cited above for linking human rights and international investment rules should leave no doubt that an MIT has a direct impact on human rights, especially on developing host States. Nor is there any doubt that an MAI cannot and should not be a general human rights instrument. Therefore it is necessary to define how much and how exactly an MAI should be linked to human rights in order to satisfy our central objective of maximizing the contributions of international investment while minimizing the problems. To summarize the arguments above: A number of reasons show that human rights should be linked to a multilateral investment treaty, but that the linkages must be limited and specific to those fields where human rights and investment requirements intersect, namely, social rights which require financial support for their realization, labor rights that delineate the relative positions of workers and investors, and those core human rights whose abuse, even by non State entities such as private investors, constitute a violation of international law.
60. From a theoretical point of view, any international economic treaty is simply another attempt to improve the lives of the citizens of the States party to that treaty, and as such is totally within the context of the existing international regime of defining and protecting human rights. However, where the means advocated for achieving this economic improvement clash, or seem to clash, with guidelines on the protection of human rights, economic treaties have tended to support solely the economic requirements. But it is clear that a more sophisticated understanding of economics and the social requirements of supporting particular economic systems – especially the freemarket liberal model – indicates that social considerations for human rights cannot be ignored or even relegated to a very low priority. These instrumental debates increasingly show that strong social and labor rights support economic liberalization. Additionally, in those infrequent instances when private investors are directly or indirectly engaged in egregious violations of human rights, there is no question that investment rules must serve to stop these transgressions on economic, political, legal and ethical grounds. Although the exact impact of economic systems on human rights has yet to be investigated, what is indubitable is that any current international economic treaty must take into account its impact on human rights obligations. Naturally, the exact scope of this analysis excites political passions, and the difficult task facing any drafter of an MIT is to create a text acceptable to a sufficiently large constituency so as to assure the text's passage and entry into force as a treaty. The increasingly political tone surrounding international economic bodies such as the WTO, the World Bank, the OECD and NAFTA indicates that economists can no longer expect to speak only to other economists, but rather must expand their vocabulary and their interests to include other segments of society. In other words, an investment treaty catering solely to business interests is no longer tenable, and any future MIT must assume that it will lose some support from some investors in exchange for support from groups which view the MIT as protecting their interests – groups concerned about the protection and propagation of human rights, for instance. Finally, the demand for increasing sophistication on the part of those negotiating an MIT inevitably pressures the institutional and bureaucratic organizations linked with such a treaty to assume a

more complicated view of the world, one in which economic interests are important but by no means paramount. Balancing (much less satisfying) all these demands in the context of one treaty is certainly a difficult task. But the alternative to success is more failures like the MAI.