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The Transatlantic Trade and Investment Partnership: A critical perspective

by

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Launched in July 2013 by the European Union and the United States, the Transatlantic Trade and Investment Partnership (TTIP) represents an important effort to reach a comprehensive economic agreement between two major trading partners. As has been pointed out, the project offers great opportunities for liberalizing trade and investment and regulatory convergence.¹ Its level of ambition implies high risks, but despite negotiators' initial optimism, its success is far from certain.

This *Perspective* focuses on the project's investment chapter, drawing lessons from the failed negotiations on a Multilateral Agreement on Investment (MAI), which was meant to consolidate the results of liberalization in the OECD area, establish new disciplines and introduce protection and dispute settlement.

As the TTIP's starting basis on investment bears a strong resemblance to the MAI, an analysis of the achievements and pitfalls of those earlier negotiations can provide useful insights. Both the TTIP and the MAI cover the pre- and post-establishment investment phases. The highest standards of treatment are envisaged in the TTIP, enforced by an effective investor-state dispute settlement (ISDS) mechanism.

On the positive side, the draft MAI reflected state-of-the-art provisions on the treatment of investors and investments, drawn mostly from such previous agreements as NAFTA and the Energy Charter Treaty, as well as bilateral investment treaties concluded by OECD members. It also included protections for host countries, such as the right to regulate, environmental and social safeguards and responsible investor conduct. Negotiators expressly protected the regulatory sovereignty of the participating countries by providing that the MAI "would not inhibit the normal non-discriminatory exercise of regulatory powers by governments and such exercise of regulatory powers would not amount to expropriation."²

MAI negotiators also agreed on the following to reflect societal interests:

- in the preamble, a strong reference to sustainable development, internationally recognized core labor standards and environmental protection;

- a prohibition on lowering health, safety, environmental, or labor standards to attract investment;
- annexing the OECD Guidelines for Multinational Enterprises, which provide expectations of governments relating to the regulation of multinational enterprises.

At a minimum, these elements should be reflected in the TTIP's investment chapter.

On the negative side, the following unresolved issues contributed to the demise of the MAI:

- the absence of a clear concept of investment to be covered by the agreement and the broad definition of "investor" (for both liberalization and protection);
- general exceptions, sector-specific exceptions and carve-outs were left open until the very last stage of the negotiations;
- permitting extensive use of investor-state arbitration.

Moreover, negotiators underestimated the political dimension of the exercise and did not reach out to stakeholders—parliamentarians, NGOs, opinion makers—until it was too late to communicate a positive image of the MAI.

How can such pitfalls be avoided in the TTIP?

There is a need for a clear-cut definition of FDI for purposes of liberalization along the lines of the agreed OECD/IMF definition. Open-ended concepts that include non-FDI forms of investment should be precluded, and the definition of "investor" should require the identification of ultimate beneficial ownership and control.

TTIP negotiators should seek an early understanding of how far parties are prepared to go in the area of liberalization, how any exceptions should be framed and whether carve-outs for any sectors or categories of measures should be permitted. Pushing these issues to the last stage of negotiations could be a road to disaster.

Although some commentators doubt that investment-protection provisions are best placed in trade and investment liberalization agreements,³ there is a definite trend in favor of the comprehensive approach taken by the TTIP and previous FTAs.

ISDS proved to be a major source of controversy in the MAI. Can the TTIP do better in achieving political acceptability? While some contentious issues, such as arbitrators' conflicts of interest, consistency of outcomes, transparency, and cost, can be addressed, the fundamental issue of legitimacy remains. Is there value in privatizing justice for the sole benefit of foreign investors when treaty partners have well-developed legal systems and independent judiciaries? There is a trade-off between substance and procedure. As the MAI experience has shown, parties are inclined to request sweeping exceptions or carve-outs when ISDS is involved. European negotiators should also be mindful that legal integration is a key feature for the Union and that the European Court of Justice should make ultimate decisions on the interpretation of European law.

Further consideration should be given to domestic political processes. Setting a tight deadline for the conclusion of the deal would be counterproductive. Key issues like

ISDS should be discussed in an open forum, and leaving room for an enlightened and comprehensive debate with a wide range of stakeholders would be beneficial to the success of the negotiations.⁴

* Rainer Geiger (rainer.geiger@hotmail.fr) is an attorney-at-law, senior lecturer of international economic law and former Deputy Director, Financial and Enterprise Affairs, OECD. The TTIP/MAI discussion in this *Perspective* was inspired by the Report by the Chairperson of the MAI Negotiating Group, May 4, 1998, DAF/MAI(98)17, available at <http://www.oecd.org/daf/mai/pdf/ng/ng9817e.pdf>, and the author's experience with the MAI drafting process. See also Rainer Geiger, "Towards a Multilateral Agreement on Investment," 31 *Cornell International Law Journal* 467 (1998). For the consolidated draft of the MAI, see <http://www.oecd.org/daf/mai>. The author is grateful to Marino Baldi, Howard Mann and Manfred Schekulin for their helpful peer reviews. **The views expressed by the author of this *Perspective* do not necessarily reflect the opinions of Columbia University or its partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

¹ Jonathan Kallmer, "The global significance of transatlantic investment rules," *Columbia FDI Perspectives*, No. 99, July 15, 2013.

² See Report by the Chairperson of the MAI Negotiation Group, *op. cit.*

³ Marino Baldi, "Are trade law inspired investment rules desirable?" *Columbia FDI Perspectives*, No. 105, September 30, 2013.

⁴ Karl P. Sauvart and Frederico Ortino, "The need for an international investment consensus-building process," *Columbia FDI Perspectives*, No. 101, August 12, 2013.

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