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The Multilateral Agreement on Investment

Making Trade Policy

In 1998, a two-year effort to negotiate a multilateral agreement on foreign investment ended in frustration and without a treaty (Graham 2000). The talks, sponsored by the Organization for Economic Cooperation and Development (OECD), aimed to create a set of global rules that would protect investors, remove governmental barriers and controls on foreign investment, and establish an effective system for settling disputes. Participants dealt not only with the challenges of the negotiations themselves but also with being made the target of a global network of protestors.

The attempt to create a Multilateral Agreement on Investment (MAI) raises questions about foreign direct investment (FDI)—cross-border ownership of companies, property, or production facilities—and its role in the world's integrating economy. Who gains and who loses from FDI? What impact does international investment have on developing countries? Should international trade agreements cover FDI?

Coverage

The rationale for free trade is that countries gain from trading because they can specialize in the activities they do comparatively well. FDI offers

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similar benefits: Host countries gain technological know-how and management skills from the foreign firms that invest within their borders, and home countries benefit because their firms are able to conduct more business abroad. Nevertheless, foreign investment can raise concerns and foreign firms are sometimes viewed with hostility. Critics fear that such firms have little interest in contributing to domestic economic development and will merely exploit a host country's resources.

Trade agreements have attempted to address FDI because FDI is often complementary to trade. For example, a firm wishing to export products or services to another country often finds it more efficient to establish a foreign presence. Thus manufacturers will set up operations to market and service their products. Rules covering foreign investment can provide a predictable playing field for investors and host countries alike. However, such rules are sometimes seen as being skewed toward protecting the investor and unduly constraining the domestic sovereignty and policy autonomy of the host country. In addition, some believe that trade agreements should not cover investment issues at all.

A country might try to simply obtain the benefits of FDI by enacting policies that create a friendly environment for foreign investors, but without a history of implementing such policies it might have trouble convincing investors that the future will be any different. By signing an international agreement, a country may make its policy commitments appear more credible. International agreements may also provide foreign investors with recourse against expropriation, requirements relating to local content and technology transfer, and the like, thereby making them more willing to invest. While some countries have tried to inhibit foreign investment, others have sought to attract it by offering tax holidays and other inducements. This competition between countries to attract foreign investment can lead to a costly race to the bottom that erodes their tax base; an international agreement might help host countries by establishing limits on such competition (Encarnation and Velic 1998, Moran 1998).

Depth

The Uruguay Round Final Act included an agreement on Trade-Related Investment Measures (TRIMs). The TRIMs agreement prohibits host countries from requiring foreign investors to use local content. But the rules in TRIMs are limited—even some investment provisions that specifically affect trade are not covered in the agreement. Some therefore believe that further negotiations are needed that will increase discipline on domestic policies that distort trade and provide additional rights for foreign investors regarding establishment, national treatment, and profit repatriation. Some of these proposed rules—for example, limiting a country from taking actions against foreign firms that it is permitted to take against domestic firms—are controversial.

Participation

Investment agreements have appeared not just in the TRIMs provisions in the multilateral World Trade Organization (WTO) but also as essential parts of regional trading arrangements. The European Union guarantees all European firms national treatment and rights of establishment. The North American Free Trade Agreement (NAFTA) requires free investment, with the exception of a few sectors. The Asia Pacific Economic Cooperation forum (APEC) countries negotiated a nonbinding agreement on investment in 1993. In addition, hundreds of bilateral investment treaties (BITs) were signed between developed and developing countries in the last quarter of the twentieth century.

What did not exist was a broad, multilateral agreement on investment. In 1995, the (mainly developed-country) members of the Organization for Economic Cooperation and Development (OECD) decided that they would attempt to negotiate such a treaty. The OECD had already concluded agreements on capital movements and guidelines for multinational behavior. Most analysts believed that OECD members, with their generally liberal investment regimes, would be able to establish a set of rules that would represent the state of the art for investment agreements. Once a MAI was concluded, non-OECD members could subscribe to it, or it could serve as the basis for an agreement in the WTO, or both.

This approach, as it turned out, created considerable problems. For one thing, the prospective benefits from an agreement among countries that already had liberal investment regimes were rather limited. Moreover, negotiators were often unwilling or unable to make significant new concessions, because the remaining exceptions usually reflected strong political or strategic considerations. In addition, some were unwilling to make concessions that would further liberalize service industries, fearing that such a move could affect their negotiating position in future WTO talks.

Enforcement

If the purpose of investment agreements is to lend more credibility to domestic liberalization measures, then logically they should be binding (because the measures will then be most credible). Foreign firms dealing with sovereign governments would also welcome the greater protection afforded to investors by the ability to appeal to binding arbitration.

Enforcement is one element that makes the prospect of including investment rules at the WTO so attractive to investors, for the WTO holds out the promise of cross-sectoral retaliation when an investment rule is broken. Thus, if a country were to violate the TRIMs, its concessions might be suspended in areas other than investment. For example, it could face tariff increases on some of its key exports. Cross-sectoral retaliation is particularly appealing to multinationals operating in countries where little other FDI is present, since retaliation in the investment sector would have negligible impact.

Developing Countries

Why should developing countries sign an agreement that would constrain their ability to control foreign investors? After all, both developed and developing countries have tried to use market access as a bargaining tool to induce foreign firms to transfer technology and to add to local employment. To be sure, as developing countries have reduced their trade barriers and become more open to international competition, the rents that foreign firms can earn by producing behind these barriers have been reduced. This reduction in turn lessens the ability of governments to persuade foreign firms to comply with such requirements. In any case, the role of these requirements remains controversial (for an analysis arguing that they are counterproductive, see Moran 2002).

Distribution

Clearly, multinational firms that seek to engage in FDI will benefit if their rights are enhanced. In addition, host countries could benefit if the agreements are successful in bringing them more FDI. The impact on workers in the home country and on capitalists in the host country is more uncertain, however. On the one hand, if trade and investment are complementary activities, and if FDI abroad boosts domestic exports, then workers in the home-country export industry could gain. On the other hand, if FDI and trade are substitutes and FDI reduces home-country exports, workers in the export industry could lose. In general, FDI increases the demand for workers in the host country, but it may also mean more competition for the country's own local firms. But spillovers of knowledge to the local economy can bring gains to domestic producers in the host country. Similarly, if FDI leads to increased exports, domestic suppliers to the foreign firms may also benefit.

Opponents of globalization generated considerable opposition to the MAI negotiations and ultimately claimed victory for the failure of the talks. Protesters viewed them as proof that multinational corporations have a controlling influence on trade negotiations. They also argued that such agreements would harm developing countries. Ironically, the protesters' success in contributing to a breakdown in the talks demonstrates that the ability of private firms to dominate trade negotiations had its limits. In addition, since there are only three developing countries in the OECD (Turkey, Korea, and Mexico), the MAI negotiated at the OECD would have had little initial impact on developing countries, except insofar as it became a model for later agreements with an expanded membership.

Governance

Providing foreign investors with an extensive set of rights is controversial, since doing so constrains governments from enacting policies they might otherwise prefer. For example, a guarantee on the repatriation of profits may limit the ability of a government to control capital outflows. Agreements to limit requirements on foreign firms may also limit a government's ability to impose such requirements on its own domestic firms. These limits are particularly contentious if they provide foreign investors with better than national treatment (i.e., rights that domestic firms do not enjoy). A noteworthy example that became important in the MAI negotiations occurred as a result of NAFTA. In NAFTA's Chapter 11, investors are guaranteed protection from expropriation without compensation at fair market value (for a more complete discussion, see Graham 1999). Chapter 11 was invoked by a foreign firm to demand compensation as a result of costs incurred by changes in domestic environmental regulations—so-called regulatory takings. Similarly situated domestic firms would not necessarily have such rights. Environmentalists have voiced concerns that the need to provide such compensation could leave countries less able to implement strict environmental policies. More generally, agreements covering foreign investment will deepen the scope of international agreements and thus further limit the choices available to those making domestic policy.

CASE STUDY: A Virtual Defeat? Stalling the Multilateral Agreement on Investment

When a group of officials from the most affluent countries sat down to pen an agreement on foreign investment in September 1995, hopes were high. "The time is ripe to negotiate a multilateral agreement on investment (MAI) in the OECD," read a report from the Organization for Economic Cooperation and Development (OECD 1995). Negotiators aimed to create a set of global rules that would protect investors, remove governmental barriers and controls on foreign investment, and establish an effective system for dispute settlement. In short, they hoped to achieve for investment what had been done for international trade in goods and services at the General Agreement on Tariffs and Trade (GATT) and the WTO. The MAI would become the new model governing international investment worldwide, replacing about 900 bilateral investment treaties.[1]

Foreign direct investment (FDI)—cross-border ownership of companies, property, or production facilities—was growing dramatically. When the MAI talks began in 1995, global flows of FDI were more than $315 billion annually, up from around $60 billion in 1985, and the total value of outward FDI stock exceeded $2.6 trillion.[2] In fact, foreign investment was growing even faster than international trade in goods and services.[3] The United States was the largest FDI recipient and investor, with $60 billion of investment inflows and $95 billion in outflows in 1995 alone.[4] The United States was also the nation lobbying most actively for an MAI.

But the proposed MAI sparked fury around the world, becoming, in the words of a European MAI negotiator, "the focal point for fears about globalization." Indeed, according to some observers, the MAI protests marked the beginning of the international antiglobalization movement (though many protesters object to that characterization, preferring to be called pro–fair trade and investment). The MAI negotiations were targeted by hundreds of grassroots environmental, consumer, and development organizations and condemned by critics ranging from labor union leaders to movie actresses, all voicing concerns about the harmful impacts of global economic integration.

Opponents of the MAI painted apocalyptic pictures of a future under the agreement, denouncing it as "the biggest power play yet of the megacorporations" (Deal 1998, 7A). A top union official called the MAI "the next big international issue for the labor movement."[5] Nongovernmental organizations (NGOs) leveraged the resources of cyberspace to create a cascade of opposition to the MAI, charging that it would threaten democracy, national sovereignty, the environment, human rights, and economic development. "The opponents' decisive weapon is the Internet," noted Guy de Jonquières of the *Financial Times*. More than 600 organizations in nearly 70 countries expressed disapproval of the talks, many organizing and com-

1. There were around 900 BITs as of mid-1995 (UNCTAD, *World Investment Report 1995,* overview, 3).

2. WTO, *Annual Report 1996*, 44; UNCTAD, *World Investment Report 1995,* overview, table 1.

3. Over the period 1973–95, the estimated value of annual FDI outflows multiplied more than 12 times (from $25 billion to $315 billion) while the value of merchandise exports multiplied 8.5 times (from $575 billion to $4,900 billion) (WTO, *Annual Report 1996*, 46).

4. UNCTAD, *World Investment Report 1996*, Investment, Trade and International Policy Arrangements, overview, 6. See also USTR, *Annual Report 1996*, section V, "Other Multilateral Activities."

5. Peter Beinart, "The Next NAFTA," *The New Republic*, December 15, 1997, 4.

municating through e-mail and Web newsgroup postings.[6] In the MAI postmortem, some observers accused NGO "network guerrillas" of "ambush[ing]" the negotiations.[7]

But the role played by NGOs and their well-organized campaign in the demise of this effort was only part of the story. Many observers say that the difficulties of the talks themselves were just as—if not more—significant. For one thing, negotiators had substantive disputes about what the MAI should achieve. In addition, the participating governments were often unready or unable to make the commitments necessary to reach agreement, proposing hundreds of pages of exceptions to the general rules. As a result, the draft text of the MAI became watered-down, "a pale imitation of the document originally envisaged," noted *The Economist*.[8] Because of such challenges, some say the NGO protests were merely the final shots into an already sinking ship. "The MAI was a wake-up call," concluded Mike Moore, who would later head the WTO; "this is how *not* to do things."[9]

Regardless of the degree to which the NGOs were responsible for ending the talks, the fight invigorated and empowered many organizations, as seen in the 1999 protests against the WTO in Seattle, Washington. Yet even after the close of the MAI negotiations, the effort to create a global agreement on investment remained alive. Indeed, some believe that portions of the MAI may ultimately serve as a model for a WTO accord.

International Investment

The MAI was largely aimed at establishing rules on FDI.[10] FDI occurs when an investor based in one country acquires an asset in another country with the intent to manage that asset. Such investment, a key pursuit of multinational corporations, includes mergers and acquisitions as well as "greenfield" investments (the creation of new facilities). Multinational enterprises invest abroad to get closer to their markets, acquire new technologies, form strategic alliances, and enhance competitiveness by integrating production and distribution. As Larry Bossidy, chairman and

6. According to NGOs, more than 600 organizations from over 70 countries signed a February 1998 joint statement opposing the MAI. Public Citizen, Friends of the Earth, and the Sierra Club press release, "International Coalition Launches Campaign Against the MAI," February 12, 1998, www.citizen.org.

7. Guy de Jonquières, "Network Guerrillas," *The Financial Times*, April 30, 1998, 20.

8. "The Sinking of the MAI," *The Economist*, March 14, 1998, 81.

9. Moore, quoted in Guy de Jonquières, "Convert to Free Trade Who Sees 'Liberalization Fatigue,' " *The Financial Times*, November 25, 1998, 7.

10. Its rules were meant to cover all types of international investment, including portfolio investment, real estate, intellectual property rights, rights under contract, and rights conferred by permits.

CEO of Allied Signal, explains: "To succeed in today's markets . . . a company cannot hope to sit back home in Dubuque making widgets and then export the finished goods to buyers abroad. . . . Either through affiliates or joint venture partners you need to be there, on the ground with local facilities. . . . To gain a foothold in an overseas market, you need to invest."[11]

Economists generally argue that FDI brings benefits to the countries that welcome it, such as technology transfer, higher wages for domestic workers, savings and capital formation, increased efficiency in production, lower prices, and higher-quality goods and services. Expanding from $25 billion annually worldwide in 1973 to more than $315 billion in 1995 when the MAI talks began, FDI is considered a critical engine of economic growth.[12] For example, in 1994, FDI in the United States supported nearly five million jobs. In addition, exports from US parent companies to their foreign subsidiaries accounted for approximately 25 percent of all US merchandise exports.[13]

The MAI rules were meant to be liberalizing—to remove existing government barriers and controls on foreign investment. Proponents of the MAI saw such liberalization as part of a global trend, as evidenced by 95 percent of the 599 changes to national regulatory FDI regimes over the period leading up to the talks (1991–96). These changes mostly involved opening industries that were previously closed to FDI, streamlining or abolishing approval procedures, and providing incentives for FDI.[14] However, many countries had done more to liberalize their trade regimes than their FDI policies.[15]

The idea of creating rules to protect FDI was not a new one. As already noted, more than 900 bilateral investment treaties had been signed throughout the world when the MAI negotiations began in 1995.[16] Most of these agreements were made between European and developing countries—fewer than 10 of the agreements were between two OECD nations. Indeed, as one observer noted, "Between OECD members, there are virtually no such agreements, since they are viewed as unnecessary" (Henderson 1999, 12).

11. Bossidy, quoted in US Council for International Investment, *A Guide to the Multilateral Agreement on Investment* (1996), as cited in Canner (1998, 658).

12. WTO, *Annual Report 1996*, 44. See also UNCTAD, *World Investment Report 1996*, xiv.

13. USTR, *1997 Trade Policy Agenda and 1996 Annual Report of the President of the United States on the Trade Agreements Program*, 142.

14. UNCTAD, *World Investment Report 1997*, overview, 10.

15. UNCTAD, *World Investment Report 1995*, overview, 3.

16. BITs are also known as investment promotion and protection agreements; 385 had been completed at the end of the 1980s. By the end of the 1990s, there were 1,857; at the end of 2002, 2,181 (UNCTAD 2000, iii; UNCTAD, *World Investment Report 2003*, overview, 7).

Table 4.1 Growth in total number of bilateral investment treaties

End of year	Total number
1959	1
1969	72
1979	165
1989	385
1999	1,857
2002	2,181

Sources: UNCTAD (2000, iii); UNCTAD, *World Investment Report 2003,* overview, 7.

Originating in Europe in the late 1950s, BITs covered market access and investor protection. Over the years, each developed country evolved its own model BIT. Generally, the host government (usually the developing country) agreed to treat foreign investors no less favorably than its own domestic investors, extending what is known as *national treatment*. The host government was also prohibited from discriminating among its foreign investors, as all were extended *most favored nation* (MFN) treatment. However, some BITs provided only MFN and not national treatment, allowing the host country to favor its own domestic firms over foreign investors.

In addition, BITs often included certain mandates for dealing with foreign investors, such as absolute protections against *performance requirements*—obligations placed on investors or their investments. For example, a government might impose a local content requirement, demanding that investors use a certain percentage of domestic inputs to achieve their output. BITs also provided guidelines on financial flows and guarantees on *expropriation*—the circumstances under which a government can deprive investors of their property. By the mid-1990s, European countries had completed more BITs than the United States, but US BITs were generally more comprehensive.[17]

The number of new bilateral investment treaties surged throughout the mid-1980s and into the 1990s as foreign investment continued to grow (see table 4.1). The pattern of these treaties began to change, as increasingly the agreements were made between two developing countries. Of the 180 BITs concluded in 1996, nearly a third were between developing countries, led by China, Chile, Algeria, and the Republic of Korea.[18]

17. The United States did not start its bilateral investment treaty program until 1982. According to Deputy USTR Jeffrey Lang, the United States had negotiated more than 40 BITs by 1998 (Lang 1998, 457). The US treaties dealt with both pre- and postestablishment issues, while European BITs generally covered only postestablishment issues.

18. UNCTAD, *World Investment Report 1997*, overview, 11.

In addition to these *bilateral* approaches to protect international investment, detailed *regional* investment provisions were featured in the 1992 North American Free Trade Agreement—negotiated by Canada, Mexico, and the United States. NAFTA's Chapter 11 was the first investment agreement involving more than two parties. As the OECD's Pierre Sauvé emphasizes, "NAFTA achieved a level of comprehensiveness in investment rule making that had never been done before, and it achieved that in a trade policy setting, affirming the close links between trade and investment—market access and market presence—in an integrating world economy."[19] NAFTA's Chapter 11 established an "investor-to-state" system of dispute settlement and banned a list of performance requirements, including export quotas. "From the perspective of an international investor," notes Stephen Canner of the United States Council for International Business, "NAFTA rules on investment were a quantum leap forward" (Canner 1998, 664).

Furthermore, NAFTA introduced a new dynamic to international investment talks: negotiation between two developed countries. Both the United States and Canada wanted to develop rules for their investments in Mexico, but in order to do so, they had to agree to abide by those same rules themselves. According to former USTR deputy general counsel Daniel Price, one of the principal US negotiators of NAFTA's investment provisions, "One of the interesting features of NAFTA is that it was really the first time that two developed countries—namely Canada and the United States—were forced by the negotiating dynamic to make the same commitments to each other that they had traditionally demanded of developing countries bilaterally."[20] To be sure, the United States and Canada had taken some steps toward investment liberalization in their free trade agreement of 1988, but the measures in NAFTA were more far-reaching.

Another regional initiative that reduced restrictions on FDI occurred in the context of efforts toward European integration.[21] The 1957 Treaty of Rome, which established the European Community, largely freed investment flows within Europe. Its rules permitted investors from European member states to establish and conduct business in other member states on a national treatment basis (see Chapter 2, Articles 43–48). The 1986 Single European Act further reduced barriers to intra-European investment,

19. Unless otherwise noted, all quotes from Pierre Sauvé come from a 2000 interview with Charan Devereaux.

20. Unless otherwise noted, all quotes from Daniel Price are from a 2000 interview with Charan Devereaux. Price co-chaired the US delegation with Bill Barreda, the Treasury Department's deputy assistant secretary for trade and investment.

21. Regional investment agreements were also under discussion among non-OECD countries. For example, talks about investment were part of the negotiations for the Mercosur agreement between Argentina, Brazil, Paraguay, and Uruguay.

and the 1992 Maastricht Treaty on the European Union gave the European Union new responsibilities over capital movements and treatment of new third-country investors.

Though NAFTA and the European agreements succeeded in making regional investment rules, attempts at developing a more global, *multilateral* approach toward FDI had not produced comprehensive results. The 1947 Havana Charter included provisions on foreign investment, but it never entered into force.[22] More recently, in 1992 the World Bank and the International Monetary Fund (IMF) completed a set of Guidelines on the Treatment of Foreign Direct Investment that endorsed national treatment and nondiscrimination among foreign investors. States and corporations thereafter regularly invoked the World Bank Guidelines as the standard for how developing nations should treat foreign capital to encourage investment, but they were not binding and did not rise to the level of a formal international agreement (Ratner 1998).

The idea of creating broad, enforceable, multilateral international investment rules was broached during the Uruguay Round of the GATT multilateral trade talks (1986–93), negotiations that included more than 100 countries. Initially, the United States had ambitious goals for investment issues in the Uruguay Round and hoped to establish comprehensive rules on FDI as a part of the talks. "Indeed," says the economist Edward M. Graham, "the original TRIMs proposals, originating in the US Treasury, were for an agenda almost as large in scope as that of the MAI."[23] However, developing countries were opposed to including such a broad discussion of investment.[24] They were suspicious of efforts to formalize investment rules, fearing that any binding policies would benefit wealthier nations and impinge on their own domestic sovereignty. Many developing countries saw the proposed international investment rules as potentially more intrusive than traditional trade rules. "Think about trade rules," says one US observer:

22. The 1947 Havana Charter was intended to create the International Trade Organization, but for various reasons (including its failure to be ratified by the US Congress) it never took effect. Instead, the GATT was born.

23. Unless otherwise noted, quotes from Edward M. Graham are from comments to Charan Devereaux, August 2003.

24. For example, in the lead-up to the March 1986 Punta del Este ministerial meeting that kicked off the Uruguay Round, the United States proposed the following investment text for the ministerial declaration: "the Contracting Parties should 1) seek to increase discipline over investment measures which divert trade and investment flows at the expense of other contracting parties, in contravention of a major objective of the GATT, i.e., 'the elimination of discriminatory treatment in international commerce,' and at the expense of sustainable economic growth and liberalization and 2) explore a broad range of investment issues in the negotiations, including: national/MFN treatment for new and established direct investment and the right to establish an investment" (GATT Doc. No. Prep. Com. 86/W/35, June 11, 1986; quoted in Gibbs and Mashayekhi 1998, 4).

> Trade rules started as regulating border measures—namely, tariffs. You were free to regulate your domestic economy as you wished as long as you didn't discriminate at the border (i.e., MFN). What the Uruguay Round did was to bring international rules to bear on some areas of internal regulation (e.g., intellectual property, technical standards, and services). Countries were reluctant to do this in the area of investment, however, because investment rules—at least in the perception of the developing world—potentially affected a much broader range of economic issues.

Developing countries were especially nervous about investment rules that included strong dictates about national treatment. In a weaker version of national treatment, foreign investors, once established, would receive the same treatment as locally owned enterprises. Proponents of stronger provisions believed that foreign investors should have the same right to establish a business as local investors. Manmohan Singh, the finance minister who began India's economic liberalization in the early 1990s, explained that though several BITs had been signed granting national treatment to foreign investors, "We are not ready as yet for right of establishment. You have to remember our history as a colony. The East India Company came here as a trader and ended up owning the country."[25]

In the end, the Uruguay Round dealt with investment on a limited basis, primarily in the Agreement on Trade-Related Investment Measures (TRIMS) and the General Agreement on Trade in Services (GATS). A brief agreement (reproduced in appendix 4A), TRIMs applies only to "trade-related" investment measures in the context of manufactured goods. In other words, the agreement was designed to prevent governments from implementing investment policies that would create trade restrictions or distortions. To that end, TRIMs emphasizes that each member government must refrain from applying measures inconsistent with GATT Articles III and XI.[26] For example, according to the agreement, it is inconsistent with GATT Article III for governments to impose local content requirements on investors, such as requiring them to use a minimum level of local inputs.

25. Singh, quoted in "Does the WTO Need Special Rules for Foreign Direct Investment? Trade by Any Other Name," *The Economist,* October 3, 1998, 10.

26. GATT Article III, Paragraph 4: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."

GATT Article XI, Paragraph 1: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

Developing countries were given five years to comply with TRIMs, and least-developed countries seven years.

Many say the TRIMs agreement proved to be "little more than an affirmation and modest strengthening of the status quo of the 1947 GATT" (Trebilcock and Howse 1999, 358). Indeed, most BITs were far more comprehensive than TRIMs. "This failure to engage on a wider set of issues during the Uruguay Round was one reason why the United States later insisted on the OECD as the venue for the MAI," says Graham (for background on the TRIMs negotiations, see Graham and Krugman 1999).

The second Uruguay Round agreement to deal with investment was GATS. According to the WTO, GATS is among the organization's most important agreements (WTO 2001, 1). It is the first and only enforceable set of multilateral rules covering trade and investment in the service sector—the largest and fastest-growing sector of the world economy. (Examples of services include banking, insurance, accountancy, telecommunications, tourism, health, and construction.) Trade in services was considered a "new issue" for GATT talks. Many developing countries initially opposed the inclusion of services in the Uruguay Round, because they viewed it as actually a means of bringing investment within the scope of GATT disciplines.[27] As one preparatory document noted,

> [S]ervices delivery, that is to say, trade in the sector, normally requires some form of investment in the place where the service is to be delivered. Consequently, an international trade regime on trade in services also implies a consideration of matters related to investments. This has in fact been one of the main reasons why the developing countries have been opposed to the inclusion of the services issue in the negotiations.[28]

The term *investment* is used sparingly in the text of GATS. One observer described the word as "pretty much taboo." Instead, the agreement refers to supplying a service through a "commercial presence"—that is, "any type of business or professional establishment" (Article XXVIII). Though establishing a commercial presence is recognized as one means by which services can be traded, members are not obliged to open all service industries to all comers. GATS is a "bottom-up" agreement, in that it applies only to activities specified in the agreement. (In contrast, a "top-down" agreement applies to all sectors unless they are listed as exceptions.) Developing countries were expected to liberalize in fewer sectors and types of transactions than the more industrialized countries. According to the WTO, it was this flexibility that put an end to the North-South controversy over services that marked the early years of the negotiations (WTO 2001, 7).

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27. Developing countries that did not oppose discussing trade in services in the Uruguay Round included Jamaica, Chile, and Singapore.

28. Latin American Consultation Meeting on Multilateral Trade Negotiations, GATT Doc. No. PREP.COM (86)/W/44/Add.1, p. 33, as quoted in Gibbs and Mashayekhi (1998, 20, n. 8).

In the concluding phase of the GATS negotiations, conflict broke out between developed countries—more specifically, between Europe and the United States. Europeans proposed that cultural industries such as magazine publishing, motion picture production, and television broadcasting be exempted from provisions such as national treatment. They argued that such exemptions were vital to maintaining national cultural identity. The Americans refused to accept a cultural exception, arguing that Europe was merely trying to protect its own industries by discriminating against foreign firms.

In the end, GATS contained a number of obligations important to foreign investors, including national treatment, MFN status, and requirements to publish government rules on trade in services. Investors' concerns were not fully addressed, however; GATS did not contain a number of provisions found in most BITs. For example, national treatment in GATS applies only to the sectors listed in the agreement—and even in the listed sectors, further exceptions to national treatment can be made. In addition, GATS allows developing countries to impose performance requirements on investors. For these and other reasons, some investors found GATS unsatisfactory.

Given how investment fared in the Uruguay Round, the United States had little appetite for anchoring a new investment negotiation at the World Trade Organization. US officials feared that attempting to negotiate with more than 100 WTO members would stymie the process and result in a weak agreement. As US NAFTA Chapter 11 negotiator Daniel Price explains,

> The Uruguay Round demonstrated the difficulty of getting developing countries to sign off multilaterally on things that they had agreed to many times bilaterally. So the US negotiators were convinced—and I think they were right in this—that if they started the process in the WTO, they would not have ended up with the type of high-standards investment agreement that would have been very effective or that the business community as well as the governments would be happy with.

But if not at the WTO, where would investment discussions take place?

The International Monetary Fund, a specialized UN agency set up to promote the health of the world economy, was one possibility. In fact, the IMF tried to promote itself as a host for investment talks in the mid-1990s. As the central institution of the international monetary system, the IMF was the logical venue for any agreement that had bearing on capital flows, some officials argued. The IMF had little experience as a negotiating venue, however. Another possible home for the talks was the UN Conference on Trade and Development (UNCTAD). Established in 1964, UNCTAD aims at the development-friendly integration of developing countries into the world economy. But UNCTAD, too, had limited experience as a negotiating venue and was seen by some as a "hotbed of antimultinational fervor." A third potential host was the Organization for Economic Cooperation and Development.

Enter the OECD

The Paris-based Organization for Economic Cooperation and Development was best known for providing research and analysis to its member countries on a variety of economic issues. Member countries included most of the developed world and a few developing countries—25 nations in all.[29] Originally formed to administer American and Canadian aid to Europe under the Marshall Plan after World War II, the OECD was a quiet organization of about 2,000 staff members and rarely claimed a role in the public spotlight.[30] "It was a talk shop," summarizes one observer.

In addition to other activities, the OECD worked to foster agreement on foreign investment issues, mostly through its Codes of Liberalization. The Code of Liberalization of Invisible Transactions was first adopted in 1951. In 1961, the OECD developed the Code of Liberalization of Capital Movements, an investment commitment that provided market access on a nondiscriminatory basis for direct investments from one OECD country to another.[31] The responsibility for overseeing and further developing these two codes lay with the OECD Committee on Capital Movements and Invisible Transactions (CMIT).

In addition to the codes, the OECD Declaration on International Investment and Multinational Enterprises had been in place since 1976. While the codes were legally binding, the declaration was not. The declaration addressed the issue of national treatment, stating that foreign enterprises

29. As of 1994, the OECD members were Australia, Austria, Belgium, Britain, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, and the United States. By 2001, OECD membership had increased to 30 countries with the addition of the Czech Republic (1995), the Republic of Korea (1996), Poland (1996), Hungary (1996), and the Slovak Republic (2000). Members share a commitment to the market economy, belief in pluralist democracy, and respect for human rights. See www.oecd.org.

30. The OECD was originally founded as the Organization for European Economic Cooperation (OEEC); the name was changed in 1961. According to the history of the OECD on its Web site, since then its "vocation has been to build strong economies in its member countries, improve efficiency, hone market systems, expand free trade and contribute to development in industrialised as well as developing countries" (see www.oecd.org).

31. Over time, the range and scope of the codes have increased. For example, the range of transactions subject to the Capital Movements Code was extended through successive revisions in 1964, 1984, and 1989. The Code of Liberalization of Current Invisible Transactions was extended in 1989. The MAI, if realized, would have superseded the codes and the Declaration on International Investment and Multinational Enterprises.

already established within a member's borders must be treated no less favorably than domestic enterprises. Further development of the declaration and other issues concerning the treatment of established foreign investors were overseen by the OECD Committee on International Investment and Multinational Enterprise (CIME). As one European analyst put it, "The OECD played a major role in the formation of international law with respect to investment" (Juillard 1998, 478).

Though they were wide-ranging, the OECD codes and the declaration had limitations. For example, some argued that the claim of the codes to be "legally binding" was rather hollow. Because they lacked dispute settlement mechanisms or enforcement procedures, members generally relied on peer pressure to encourage adherence to the codes. Moreover, they did not bind members to specific measures or programs of liberalization—it was up to each country to determine how, when, and how far to liberalize. As the codes evolved, member governments also retained the right to enter reservations to specific items, thereby limiting the degree to which they would put those commitments into effect.[32] Thus Canada exempted transport, energy, culture, telecommunications, and fisheries sectors from the codes (Dymond 1999, 27). Another limitation was that the codes applied only to national governments—for example, only to the federal and not the state or local government in the United States. And even at the federal level, they were binding in the United States only by executive order. Thus, any law that was enacted could override the OECD's codes. Finally, national treatment was addressed only in the OECD's Declaration on International Investment and Multinational Enterprises, which (as already noted) was not legally binding.

To address the last of these problems, in 1991 the CIME attempted to achieve a binding National Treatment Instrument (NTI). The discussions failed to produce an agreement, in part because some European governments insisted that the NTI cover law and policy at the level of subnational (provincial, state, and local) as well as national governments. The US CIME representatives opposed this, because any agreement binding state governments would meet resistance back at home. Another source of conflict was the insistence of some countries on excluding cultural industries—such as motion pictures and publishing—from the agreement.

The failed NTI talks left the CIME needing to find a new approach. The group began to explore the possibility of creating a broader instrument for investment protection, initiating a three-year feasibility study in June 1992. Involving a wider range of issues, delegates reasoned, would offer more opportunities for trade-offs and thus a better chance of success. Some note that by this logic, perhaps the entire investment agenda would

32. Where reservations were not in place, members committed to remove restrictions (in a "rollback"); they also agreed to a "standstill"—i.e., to rule out the introduction of new restrictions.

be more reasonably negotiated in the WTO, which provides an even broader set of issues for trade-offs (on the NTI, see Graham 2000, 20–22).

In 1995, the CIME and the CMIT committees prepared a report for the OECD Council's ministerial meeting. It argued that an MAI was "needed to respond to the dramatic growth and transformation of foreign direct investment (FDI) which has been spurred by widespread liberalisation and increasing competition for investment capital" (OECD 1995).

The country most actively lobbying for further OECD investment talks was the United States. "It was really a US initiative," says one observer. One of the US MAI negotiators, USTR's Joseph Papovich, recalls the rationale for pursuing negotiations at the OECD.

> Developing countries weren't willing to agree to the kinds of investment protection that should be provided to investors. The United States suggested to the Europeans that it would be a good idea to try to reach an agreement of like-minded countries on investment that was at a very high level, similar to what we seek in our bilateral investment treaties. That high-level standard investment agreement might then be used as a model for negotiating a multilateral investment agreement with developing countries.[33]

Many European countries were also interested in negotiating an OECD agreement. As some point out, institutional dynamics played a role in the OECD's appeal: EU member states may have favored a negotiation in that forum, where they could bargain on their own behalf, rather than at the WTO, where the European Union was represented as a single entity by the European Commission. In addition, an MAI made sense for a variety of substantive reasons. "With European bilateral agreements saying nothing about preestablishment and little on investment in the regional agreements that the EU had concluded, the EU saw real benefit in negotiating something on liberalization and investment in a multilateral agreement," one Austrian MAI negotiator remembers. "Because it was not possible in the Uruguay Round, they settled for the OECD as the second-best solution."

In short, the idea of negotiating an investment agreement at the OECD made sense to many participants, not least because OECD members were so deeply involved with foreign investment—the source of 85 percent of all FDI and home to 65 percent of the inflows.[34] OECD member governments also had a record of progressively freeing cross-border capital flows and reducing restrictions on inward FDI through agreements such as NAFTA and EU 1992. Moreover, OECD negotiations would not be constrained by the need to be trade-related, as they had been at the WTO. The

33. Unless otherwise noted, all quotes from Joseph Papovich come from a 2000 interview with Charan Devereaux.

34. Robert Ley, "The Multilateral Agreement on Investment: Some Questions and Answers," *Special Edition of the OECD Observer from the WTO Ministerial Conference in Singapore*, December 1996, 28.

OECD itself perceived a need to negotiate an MAI—the CIME and CMIT concluded in their report, "Foreign investors still encounter investment barriers, discriminatory treatment and uncertainties" (OECD 1995)—and had already laid the foundations for sponsoring it. Hosting the talks, wrote Robert Ley, head of the OECD's Capital Movements, International Investment and Services Division, "was a logical step to consolidating and completing the existing OECD instruments which had helped promote international investment and economic cooperation for many years."[35] Observers also note that the liberalization of external investment had generally progressed without arousing serious political opposition. The extensions made to the OECD Codes of Liberalization over the years had interested only a circle of experts.

Furthermore, some see broader, institutional concerns behind the OECD's interest in investment negotiations. An official closely involved in the talks points out that the MAI came at a time when the institution was going through "a bit of a midlife crisis" and was looking for a new project to reaffirm its legitimacy and relevance. In addition,

> The OECD was under a lot of stress on the budget front and the US had led discussions to slash the budget. One of the things the OECD decided to do was push the MAI, which was initially championed by the US government, and put a lot of resources into this as a way to perhaps endear itself to the government that had the greatest influence over its budgetary future.

Not all observers are persuaded by such institutional explanations, however—especially because OECD efforts are initiated when the representatives of member governments agree on a project, not at the will of the organization. It is not the Secretariat's role to have an opinion on whether to negotiate an agreement: Its role is to provide support for work pushed by member countries.

Some business groups came out early in support of an OECD investment agreement. The US Council on International Business (USCIB),[36] which is the US representative to the OECD's Business and Industry Advisory Council (BIAC), urged the OECD to move toward negotiating a wider investment instrument. In March 1995, the USCIB released a statement outlining what US businesses sought in an MAI. "For multinationals, investment was becoming as important, if not more important, than trade as a means of market access," says Steve Canner, USCIB's vice president for investment and financial services.

> Even though countries openly court foreign investment, many sectors are still closed. In addition, once you get into a market, you often find that governments

35. Ley, "The Multilateral Agreement on Investment," 28.

36. Founded in 1945 to promote an open world trading system, the USCIB had a membership of about 300 global corporations, professional firms, and business associations.

> do things that make it inefficient and more expensive for corporations to operate. For example, a government might say to a corporation, "You have to produce your widgets here or you can't sell them in the local market" or "You must agree to export a certain amount from this facility which you otherwise would have exported from another facility." That disrupts your business plan. Many government mandates of performance requirements get in the way of doing business efficiently. Addressing these concerns was the key attraction to negotiating an MAI.[38]

Yet business community support for OECD investment talks did not run very deep, according to some observers, including Pierre Sauvé (described by some as an "internal critic" of the talks). At the time of the MAI negotiations, he was at the OECD's International Trade Directorate. "What makes the MAI such a fascinating story," says Sauvé, "is that the bureaucracies were proposing an agreement that the private sector in most countries was not necessarily calling for. The whole initiative could be described as a solution in search of a problem. Even in the private sector, almost the only business group that took an interest in the MAI was the USCIB, a business grouping with strong ties to both the State Department and the US Treasury (both of which tended to take the lead in international investment matters, with USTR traditionally assuming a secondary role) and the OECD." For example, before he became president of the USCIB in 1984, Abraham Katz had for three years served as the US ambassador (and State Department representative) to the OECD.

The Lead-Up to the MAI Negotiations

A mandate to negotiate a Multilateral Agreement on Investment was expected to be approved by OECD ministers, but a statement was needed to kick off the talks. The wording of this report would frame the goals of the negotiations. The proposed agreement would focus on three areas: a broad multilateral framework of rules for investor protection, the liberalization of investment regimes, and the creation of effective procedures for dispute settlement. Unlike the previous OECD codes, the MAI was to be a freestanding international treaty "open to all OECD Members and the European Communities and to accession by non-OECD Member countries" (OECD 1995).

Disagreements arose over the draft report—some of the arguments were familiar. One EU-US conflict centered on the coverage of subfederal governments, such as those in US states and localities, Canadian provinces, and Australian states.[39] Another controversial issue was the treatment of

38. Unless otherwise noted, all quotes from Steve Canner are from a 2000 interview with Charan Devereaux.

39. "US Blocks OECD Investment Recommendation over Coverage Dispute," *Inside US Trade*, April 28, 1995.

regional economic integration organizations (REIOs), such as the European Union.

In April 1995, the United States refused to endorse the report kicking off the MAI negotiations, charging that it tilted too far toward the European Union on these issues; it gave its support after changes were made. OECD negotiators also agreed to a US request to change the name of the agreement from the Multilateral Investment Agreement (MIA) to the Multilateral Agreement on Investment (MAI). As one American put it, the abbreviation *MIA* has "unfortunate associations" with soldiers missing in action.[39] (Observers later commented that in Italian, the word *mai* means "never.") The CIME and CMIT report calling for the MAI negotiations specified that its goals were to

> a) set high standards for the treatment and protection of investment;
>
> b) go beyond existing commitments to achieve a high standard of liberalization covering both the establishment and postestablishment phase with broad obligations on national treatment, standstill, rollback, nondiscrimination/MFN, and transparency, and apply disciplines to areas of liberalization not satisfactorily covered by the present OECD instruments;
>
> c) be legally binding and contain provisions regarding its enforcement;
>
> d) apply these commitments to all parties to the MAI at all levels of government;
>
> e) deal with measures taken in the context of regional economic integration organizations;
>
> f) encourage conciliation and provide for effective resolution of disputes, taking account of existing mechanisms;
>
> g) take account of member countries' international commitments with a view of avoiding conflicts with agreements in the WTO such as GATS, TRIMs, and TRIPS; and with tax agreements; and similarly seek to avoid conflicts with internationally accepted principles of taxation. (OECD 1995)

In May 1995, with the approval of OECD ministers, officials announced the decision to begin talks on a Multilateral Agreement on Investment. Sir Leon Brittan, the European Commission's top trade negotiator, said the future agreement was the "biggest single step we can take to encourage growth and international economic relations" (quoted in Patel 1995, 2A). Attending the OECD meeting as an observer, WTO Director-General Renato Ruggiero privately cautioned ministers against bypassing the WTO.

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39. "US Agrees to OECD Investment Mandate After Report Is Changed," *Inside US Trade*, May 5, 1995.

The MAI would not be truly multilateral, he said, unless non-OECD members were able to take part in drafting the document. Some suspected that developed countries would create an agreement that did not take the views of developing countries into account. OECD Secretary-General Jean-Claude Paye stressed that the ultimate objective of OECD members was to draw up an accord that could be universally accepted, an aim that implied the need to coordinate with the WTO "in due course," as well as to consult with non-OECD countries.[40]

US officials noted that their goal for the MAI was to get "high standards" through the OECD and then to "spread [the agreement] to countries in transition and developing countries, starting with dynamic Asian and Latin American countries." But European delegations insisted that they must be careful not to present a fully negotiated text to non-OECD countries on a take-it-or-leave-it basis.[41] "Rule number one of negotiating an agreement," emphasized one European observer, "is that you have to give all parties a sense of ownership over the process." As Brittan put it, "Our approach has always been that there should be parallel discussions in the WTO in order to involve the developing countries and not to present a treaty to them as a fait accompli."[42] Canada was supportive of such parallel talks, but European officials reported that the idea was cold-shouldered by the United States.

Some US observers countered that in fact, investment rules penned by richer countries in the form of BITs had frequently been signed by developing nations seeking to attract greater flows of international investment. "Some people nevertheless thought that developing countries would not agree to the same rules if they were packaged as part of the MAI," recalls US NAFTA investment negotiator Daniel Price. "I think that argument is a red herring. It has been demagogued both by developing countries and by critics of the MAI process, but it's really a false argument. The truly mistaken premise was that the like-minded countries would be able to reach agreement. By that I mean that divisions within the capital-exporting, developed world led to the demise of the MAI, not objections by developing countries."

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40. Ruggiero's aides and Paye quoted in Jan Kristiansen, "OECD States Set Negotiations on Investment Treaty," Agence France-Presse, May 23, 1995.

41. US and European officials quoted in Jan Kristiansen, "OECD States Consider Investment Treaty," Agence France-Presse, May 23, 1995.

42. Brittan, quoted in "OECD Investment Pact 2: Accord Will Involve Non-Members," Dow Jones International News, May 23, 1995.

The MAI Talks Begin

The MAI talks began in September 1995. Negotiators were aiming to draft the treaty by the May 1997 OECD ministerial (less than two years away), a deadline that would enable the MAI to be integrated into the 1999 WTO ministerial. A progress report on the negotiations would be issued at the 1996 OECD ministerial.

The negotiators met every six weeks or so at the OECD Secretariat in Paris. Frans Engering of the Netherlands Economic Affairs Ministry, described by one observer as "a consensus-seeking individual," served as chairman of the MAI Negotiating Group. The two vice chairs were Akitaka Sakai, from the Japanese Foreign Ministry, and Alan Larson, assistant secretary of state for economics and business at the US State Department. Sakai and Larson managed the process between meetings and made proposals to the negotiation group. Some viewed the two as representing the extreme positions in the OECD on investment liberalization, noting that "the US has been the strongest champion of open doors in investments while Japan is often criticized for being inhospitable to such flows."[43]

MAI working groups were established on a variety of investment-related issues, covering market access, investment protection, dispute settlement, institutional questions (such as the relationship with non-OECD members), special topics (such as privatization and monopolies), and financial matters. Composed of representatives from each OECD member country, each working group reported back to the MAI Negotiating Group. Most OECD committees had working groups, so this pattern was familiar, though some participants felt that the MAI talks involved an unusually heavy program of discussions.

A WTO representative attended all the meetings of the MAI Negotiating Group as an observer, and representatives of the IMF and the World Bank were sometimes present. MAI negotiators also met with members of the OECD Business and Industry Advisory Group "just about every negotiating session," according to USCIB's Steve Canner, usually just before the actual talks began. "We also had informal discussions," he adds; "occasionally we would submit papers, but it was basically an informal give-and-take." OECD officials also met with the OECD Trade Union Advisory Committee (TUAC), which is the interface for labor unions with the OECD and, like the BIAC, had consultative status with the OECD and its committees.

The core principles of the MAI were national treatment and MFN status. Because the MAI was a top-down agreement (unlike GATS, which was bottom-up), any investment area not specifically listed as an ex-

43. "OECD Mulls Multilateral Pact on Investments," *The Asian Wall Street Journal*, November 9, 1995, 1.

ception would automatically be subject to the MAI disciplines. In other words, exceptions would establish which MAI rights and obligations each country would adhere to. Country-specific exceptions would also be subject to "standstill" (i.e., exceptions could not be added later), and "rollback" (i.e., each member would phase out their exceptions over time).

Outside of this basic architecture, the visions of how the agreement would accomplish its goals diverged. Notably, European and US negotiators had different ideas about how to remove government controls and barriers on foreign investment and thereby liberalize it. As USCIB's Steve Canner recalls,

> From the outset, the US wanted to liberalize barriers. The Europeans, on the other hand, started out with the notion that liberalization might happen somewhere down the road, but initially you'd just follow the OECD model and freeze existing stuff into place. Liberalization would be a second phase of this exercise. This difference didn't come out immediately, but about a year into the negotiations. There was never any agreed model of how to do this. Do you follow the WTO trade model or the OECD model? So the whole concept of liberalization, how to achieve it, what time frame to use, and how to negotiate it was not well thought out or well planned. That was the first sign of trouble.

In addition, though OECD members were often referred to as "like-minded" countries, in fact their investment practices differed. Negotiators were not always willing or able to agree to changes in their own domestic policies; not surprisingly, each negotiating party wanted *other* countries to change or revise discriminatory practices, while leaving its *own* domestic laws and policies unaltered. "If any large negotiation is a matter of give-and-take," writes the economist Edward Graham (2000, 25), "the MAI negotiating parties seemed, almost from the beginning, prepared only to take, and to give nothing of substance in return." For example, as noted above, US negotiators worried that possible REIO exceptions in the MAI would become the basis for eroding the rights of US-based firms operating in Europe.[44] But their hopes to change this practice did not increase their willingness to discuss modifying US practices. One frustrated observer complained, "The United States was not about to change any of its own laws or regulations. So how could they expect others to liberalize?"

Another challenging issue was taxation. In January 1996, the MAI negotiators formed an expert group to determine what tax-related provisions should be included in the agreement. Ultimately, they chose to carve taxation issues almost completely out of the MAI (OECD 1996b, 2), deciding instead to "carve in" a small number of tax issues that could impede investment. Business was not happy with this choice. The International Chamber

44. Conversely, Europeans have repeatedly charged over the years that EU-based firms often do not receive as favorable treatment under US law as do US-based firms under EU law.

of Commerce (ICC) released a statement urging that these issues be included to prevent governments from using tax measures to circumvent MAI obligations: "Without the inclusion of taxation, or at least an anti-abuse clause, the MAI would set a lower standard than that of many existing bilateral investment treaties" (ICC 1998). The European-American Business Council, an association of 80 US and European companies, similarly declared its disappointment "that MAI negotiators have chosen to carve taxation issues almost completely out of the agreement. If the MAI does not require national treatment in taxation policy, governments will be able to use discriminatory tax measures to circumvent their MAI commitments. Without disciplines, taxation can effectively become expropriation."[45]

During the MAI talks, the passage of the US Helms-Burton Act created even more controversy. Formally known as the Cuban Liberty and Democratic Solidarity Act, the legislation was meant to tighten the economic noose around Cuba's President Fidel Castro by discouraging foreign investment in Cuba.[46] It was signed into law by President Clinton on March 12, 1996, after being overwhelmingly approved in both houses of Congress (74–20 in the Senate, and 336–86 in the House). The month before, Cuban MIG fighters had shot down two US civilian airplanes owned and piloted by members of a Miami-based Cuban exile group called Brothers to the Rescue, killing four.[47] Leading Republicans—including Majority Leader Robert Dole (KS), who led the fight for Helms-Burton in the Senate—had criticized Clinton for being too soft on Castro.

Helms-Burton allowed US nationals to sue in US courts foreign companies that "trafficked" in property expropriated by the Castro regime after it took power in 1959. In addition, US visas would be denied to individuals (and their families) who "trafficked" in expropriated property, including executives of foreign corporations with interests in that property.[48] Helms-Burton also barred certain products from entering the United States unless they were certified as non-Cuban in origin. US officials composed a statement to the MAI delegations that described how Helms-Burton would be implemented and enforced; it also noted that "The Pres-

45. The European-American Business Council, "Policy Statement on the MAI," March 1998.

46. Its sponsors were Senate Foreign Relations Chairman Jessie Helms (R-NC) and House International Relations Western Hemisphere Subcommittee Chairman Dan Burton (R-IN). The 1996 Iran-Libya Act, which penalized foreign companies that invested in Iran's or Libya's petroleum sector, also came under discussion at the MAI talks.

47. Brothers to the Rescue had earlier been the subject of two actions by the Federal Aviation Administration for violating Cuban airspace, contrary to FAA regulations; at least one incident involved an aircraft buzzing Havana and dropping anti-Castro leaflets.

48. Unusually, Helms-Burton defined expropriation retroactively. Thus Cuban Americans who were US nationals at the time the law entered into force could sue under Helms-Burton regardless of their nationality at the time their property was expropriated.

ident recognized the need to take strong measures after the recent downing of unarmed US civilian aircraft by the Cuban Government" and that the deadly incident "greatly increased the bipartisan sentiment on Congress to pass this tough legislation."[49]

Helms-Burton had a powerful impact on the MAI negotiations. Though President Clinton was able to waive some of the law's most controversial provisions, Europeans, Canadians, and many others were angered by its attempt to impose US laws on other nations and their companies. Such extraterritorial reach was antithetical to the US position regarding the MAI, they said. A spokesperson for Canada scolded the United States, "the leading proponent for an investment agreement with the highest possible standards," for having "taken actions, and ha[ving] incorporated into its law further measures that strike at the very core of these negotiations."[50] According to an observer, efforts by the chief US negotiator, Alan Larson, to argue that Helms-Burton was a legitimate security exception further chilled the talks as a whole. Canada called on negotiators to incorporate into the MAI language prohibiting boycotts of firms that invested in third countries. Most OECD members supported the Canadian proposal, but in the face of US opposition negotiators opted only to have an expert-level group study the issue. "Helms-Burton now seems to have become the political football in this negotiation," said one official. "It will come back to haunt us."[51]

The European Union, which had a complaint against Helms-Burton at the WTO, halted the action with the understanding that the law would be addressed in the MAI negotiations. However, it reserved the right to renew the case if necessary. "The Europeans were quite clear that despite the fact that they wanted to conclude the MAI, there had to be a solution on Helms-Burton either as part of the MAI or concomitant to it," says USTR's Joseph Papovich. The law kept on provoking debate and bad feeling as the talks continued. "Helms-Burton was incompatible with both the letter and the spirit of the MAI," Pierre Sauvé emphasizes. "This was a real problem throughout the negotiations. It provided a lot of ammunition against the US."

Another contentious debate arose concerning the treatment of cultural industries. In June 1996, France proposed a general exception for any measure that regulated foreign investment in order to preserve and promote cultural and linguistic diversity (Dymond 1999, 35). Without such

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49. "United States Statement on the Helms-Burton Act," reprinted in *Inside US Trade*, March 22, 1996.

50. Quoted in "Canada Takes Initiative Against Cuba Sanctions in NAFTA, MAI," *Inside US Trade*, March 15, 1996.

51. "Canada Proposes OECD Disciplines on Extraterritorial Measures," *Inside US Trade*, July 5, 1996.

an exception, France worried that it would no longer be able to protect its domestic arts (through subsidies to filmmakers, for example) without being obliged to offer the same kind of help to nationals of all countries. Canada similarly favored insulating the cultural sector from MAI disciplines. US entertainment and media interests made the idea of a general exception unacceptable to the United States; one US official called it "a deal breaker."[52] Japan also objected to the cultural exception.

Despite these disagreements, the MAI talks pressed forward. In April 1996, in its report to the OECD Ministerial Council, the MAI Negotiating Group concluded, "Overall, the negotiations are on course. Most substantive issues have been examined and a framework for the MAI is evolving. . . . However, much remains to be done. . . . Some difficult choices remain" (OECD 1996a, 3). It reported that work on investment protection was proceeding rapidly, with key provisions on national treatment, MFN status, and transparency "well advanced"; the outline of a dispute resolution mechanism was likewise "in an advanced state of development."[53]

OECD ministers responded with a communiqué calling on the MAI to "aim at achieving a higher level of liberalization" and "engage in an intensified dialogue with non-member countries, in particular those interested in acceding to the MAI."[54] Brazil, China, and Lithuania were among the non-OECD countries that were invited to watch the negotiations. Before the talks ended, Argentina, Chile, Estonia, Hong Kong, Latvia, and the Slovak Republic would also participate as observers in the MAI Negotiating Group (Geiger 1998, 474). The question of the WTO's involvement in the process also continued to create debate. At the urging of France, Germany, and other nations, the OECD ministers affirmed their interest in examining investment issues in the WTO, committing to "begin an examination of trade and investment in the WTO and work towards a consensus which might include the possibility of negotiations."[55]

At the ministerial, observers noted that the United States had not yet paid its 1996 share of the OECD budget and owed about $50 million from 1995 (having paid only one-third of the total due). "One member country, and not the least member country, has not paid its dues," OECD Secretary-General Paye noted. "If mandates are given to the [OECD], then the means should come with it." The United States and other coun-

52. Quoted in "US Draws Hard Line Against Blanket Cultural Carve-Out in MAI," *Inside US Trade*, November 1, 1996.

53. OECD (1996a, 3), and William H. Witherell, director of financial, fiscal, and enterprise affairs at the OECD, "An Agreement on Investment," *OECD Observer,* 1996, 8.

54. OECD, "Communiqué: Meeting of the Council at Ministerial Level," Paris, May 21–22, 1996, in *OECD Observer*, June 16, 1996.

55. OECD, "Communiqué."

tries were also seeking a 2.5 percent reduction in the OECD budget for the 1996 fiscal year. [56]

By January 1997, the OECD Secretariat had produced a first draft consolidated text of the MAI that captured the state of the negotiations after 15 months of work.

The Opposition Organizes

The North American Free Trade Agreement—specifically Chapter 11—was used as a point of reference in the MAI talks. "The MAI took its investment model from NAFTA," says Georgetown University Center for Public Interest Law's Robert Stumberg, a consultant to anti-MAI governors and members of Congress. "It was maybe 10 percent broader than NAFTA's Chapter 11."[57] NAFTA's importance to the MAI story extends beyond its contents, however. In the United States and Canada, a number of NGOs organized against NAFTA. The US Congress passed the agreement, but not without a heated battle that left environmental, labor, and consumer groups more engaged on the issues of trade generally (though not Chapter 11 specifically). North American NGOs apparently chose to focus this energy on the emerging MAI: "NAFTA on steroids" was one of the buzz phrases used to rally opposition to the agreement.

In February 1997, a citizen's watchdog group called the Council of Canadians procured a working draft of the MAI that was not intended for public distribution.[58] Some believe that this vanguard of the anti-NAFTA crusade in Canada was given the document by a Canadian government official. Many NGOs heralded the dissemination of the draft as the first step in tearing down the wall of secrecy cloaking the talks. Negotiators, though concerned, did not panic at the leak. According to one,

> It wasn't an enormous betrayal of confidence or devastating to the negotiating process. More than anything, it was embarrassing. The OECD, like the WTO, has

56. Quote from Paye and information about the OECD budget, "OECD Ministers Move Toward Trade and Investment Talks in WTO," *Inside US Trade*, May 25, 1996. As decided in 1994, OECD Secretary-General Jean-Claude Paye was replaced by Canadian Donald Johnston on June 1, 1996.

57. Unless otherwise noted, all quotes from Robert Stumberg are from a 2000 interview with Charan Devereaux.

58. According to the organization's own Web site, www.canadians.org, the group, founded in 1985, "is Canada's pre-eminent citizens' watchdog organization, comprised of over 100,000 members and more than 70 Chapters across the country. Strictly non-partisan, the Council lobbies Members of Parliament, conducts research, and runs national campaigns aimed at putting some of the country's most important issues into the spotlight: safeguarding our social programs, promoting economic justice, renewing our democracy, asserting Canadian sovereignty, advancing alternatives to corporate-style free trade, and preserving our environment."

> a policy of restricting certain documents, and who knows, maybe the days are numbered for that process. So suddenly, this document appeared on the Internet—everybody had a copy. It was complicated by the fact it did not remain the right version for long. At each monthly meeting, pieces of the text were renegotiated intensively while the NGOs were still wanting to talk about this document that was no longer relevant.[59]

The groups opposing the agreement included Friends of the Earth, the Preamble Center for Public Policy, the International Forum on Globalization, the Third World Network, Oxfam, Amnesty International, the Sierra Club, and Global Trade Watch, a division of Public Citizen. Some labor unions and politicians began to take note of the negotiations. Pat Buchanan called the MAI the next great economic struggle, and Ross Perot's Reform Party opposed the plan.[60]

One of the primary tools employed in the organizing effort against the MAI was the Internet. In addition to creating a profusion of Web sites—more than 1,000 protesting the MAI—NGOs built electronic mailing lists and used e-mail to drum up support among their constituencies. "Being able to organize this way was tremendously important," says Margrete Strand of Public Citizen's Global Trade Watch. "It provided ways for meeting and connecting our activists. It helped organize the movement."[61]

Even as news about the MAI ricocheted across the Internet, it was barely noticed in the elite US press. Though stories appeared in the *Financial Times*, the *Journal of Commerce*, and the *Economist* during the lead-up to the MAI talks and the first two years of the negotiations, the *New York Times*, the *Washington Post*, the *Christian Science Monitor*, *USA Today*, the *Wall Street Journal*, and the *Los Angeles Times* mentioned the negotiations briefly if at all.[62] In response to the lack of coverage, the International Forum on Globalization (IFG) raised money to purchase full-page ads in the *International Herald Tribune* and the *New York Times* asking the bold question, "Top Secret: New MAI Treaty, Should Corporations Govern the World?" Strand reflects,

59. The OECD has since made available a large quantity of documents related to the MAI negotiations. See www.oecd.org.

60. Peter Beinart, "The Next NAFTA," *The New Republic*, December 15, 1997, 4.

61. Unless otherwise noted, all quotes from Margrete Strand are from a 2000 interview with Charan Devereaux.

62. This description of news coverage is based on Lexis-Nexis and Factiva database searches. A story about FDI in *The Christian Science Monitor* mentioned the MAI talks (David Francis, "Business Goes Global as Investment Booms," November 17, 1996, 1), and two short articles appeared in *The Wall Street Journal* (Eduardo Lachica, "OECD Nations Ask Outsiders to Join Investment Treaty," November 9, 1995, A17; "EU Official Proposes Talks on Global Investment Pact," February 1, 1995, A7).

> Part of what we had to face was that the big papers and the large media did not cover the MAI at all. They didn't even mention that it was being negotiated or that there was all this activity going on against it. So we had to find a way to get to people and inform them about what was gong on. Which is why the Internet became so important—because people couldn't just pick up a copy of the local paper and read about it.

In other countries, the MAI was covered more widely. In Canada, for example, a front-page headline declaring "Treaty to Trim Ottawa's Power" ran in the Toronto *Globe and Mail* in April 1997, just before elections.[63]

Perhaps the most politically charged accusation made by the NGOs was that the talks were not inclusive—that they were taking place largely in secret, without public participation or scrutiny. This argument gathered force and was repeated by the mainstream press. Lori Wallach of Public Citizen was quoted as saying that there was no way the MAI would pass "the Dracula test," because it couldn't stand the light of day.[64] NGOs were incredulous that the business community had been involved in the talks all along, while representatives of nonprofits and other interest groups had no role at all. Strand explains, "The fact that business had a seat at the table and we didn't—I think it raised the stakes and got both NGOs and activists incredibly angry. Whatever happened to democracy?"

To underscore the lack of a democratic process, NGO representatives and Web sites often cited a characterization of the MAI attributed to WTO Director-General Renato Ruggiero: "We are writing the constitution of a single global economy." If such a sweeping document was under negotiation, MAI opponents said, why was participation limited? Ruggiero's quotation was picked up by journalists, appearing in the *Wall Street Journal,* the *Nation*, the *Jakarta Post*, the *Toronto Star,* the *Guardian*, and elsewhere.[65] The WTO responded in February 1998 with a press release:

> In recent days a number of news organizations have run stories containing an erroneous quote linking WTO Director-General Renato Ruggiero with the negotiations for a Multilateral Agreement on Investment. This erroneous statement has been supplied by a number of special interest groups which oppose the MAI. . . . On 16 January in London, Mr. Ruggiero gave a speech at Chatham House in which he quoted John Jackson, the highly respected law professor from the University of Michigan. "John Jackson has described the multilateral trading system

63. Laura Eggertson, "Treaty to Trim Ottawa's Power," *The Globe and Mail* (Toronto), April 3, 1997, A1.

64. For example, see Paul Magnusson and Stephen Baker, "The Explosive Trade Deal You've Never Heard Of," *Business Week*, February 9, 1988, 51.

65. For example, see George Melloan, "Crony Capitalists Will Cheer for the Seattle Zanies," *The Wall Street Journal*, November 2, 1999, A27 ("MAI, in case you missed the excitement last year, refers to the Multilateral Agreement on Investment, once described by former WTO Secretary General Renato Ruggiero as 'the constitution for a global economy' ").

as a 'constitution' for the world economy." At no point in that speech, nor in any other, did Mr. Ruggiero make a reference to the MAI and its role in the global economy.[66]

According to an UNCTAD press release, in an October 1996 speech to the UNCTAD Trade and Development Board, Ruggiero said of the multilateral trade order, "We are no longer writing the rules of interaction among separate national economies. We are writing the constitution of a single global economy."[67] But he was speaking of the multilateral trade order, not the MAI.

Not just concerned about secrecy and democracy, NGOs criticized the MAI generally as dramatically skewed toward protecting investors. They argued that through their right to sue national governments under the agreement's investor-to-state dispute settlement procedures, corporations would gain power and threaten domestic laws. Robert Stumberg notes that for this and other reasons, the MAI "makes previous sovereignty debates look like parlor conversations."[68]

Environmental groups were particularly fearful that corporations could use the MAI to strike down environmental laws and regulations. A frequently invoked example was a complaint brought against the Canadian government under NAFTA's Chapter 11. The Ethyl Corporation of Richmond, Virginia, claimed that a bill passed by the Canadian parliament banning the gasoline additive MMT (methylcyclopentadienyl maganese tricarbonyl) violated NAFTA and was tantamount to expropriation. Because Ethyl's Canadian business consisted of importing MMT into Canada, blending it with fuel, and then distributing that blend nationally, the ban effectively prevented the company from conducting its business. Though the impetus for the bill came from the Canadian Environmental Ministry, the parliament did not impose an outright ban on the use of MMT on environmental grounds; instead, it disallowed interprovincial trade of the additive. Technically, the Ethyl Corporation could have manufactured MMT in each of the Canadian provinces, but the costs of doing so were prohibitive. In addition to its NAFTA complaint, Ethyl brought a Canadian court case arguing that the ban violated the country's laws that govern interprovincial

66. WTO press release, Press/91, "WTO Denies Claims by Special Interests Linking Ruggiero to MAI," February 17, 1998. For the speech, characterizing the multilateral trading system as intended to increase the scope of national treatment and MFN status, see Renato Ruggiero, "The Multilateral Trading System at 50," address to the Royal Institute of International Affairs, London, January 16, 1998.

67. UNCTAD press release, "UNCTAD and WTO: A Common Goal in a Global Economy," TAD/INF/PR/9628, October 8, 1996, www.unctad.org.

68. Peter Beinart, "The Next NAFTA," *The New Republic*, December 15, 1887, 4.

commerce and seeking $251 million in restitution. In July 1998, before the NAFTA complaint could enter the dispute settlement process, the Canadian government settled with Ethyl for $13 million (for a thorough discussion of the case, see Soloway 1999). More important, in the eyes of many observers, the MMT ban was repealed.

Though the case was not formally decided in Ethyl's favor, a number of MAI opponents saw the case as a harbinger of things to come. The MAI, they argued, would allow foreign investors to seek compensation for "regulatory takings"—when a host government reduced the value of an asset through regulation. In the words of a Friends of the Earth policy paper, the MAI "empowers foreign corporations with a new avenue for challenging environmental laws" (Vallianatos 1998, 14). Opponents argued that the agreement would undermine health and safety laws around the world: Countries would resist banning dangerous products out of fear they could be sued by foreign companies hurt by such regulations.

Some observers—including Daniel Price, who negotiated Chapter 11—point out that the mere lodging of the Ethyl complaint does not demonstrate that the case was legitimate or that the NAFTA rules were problematic. Price says, "The possibility that a case can be brought against the United States or Canada can't be used as an indictment of the rule. Cases—even frivolous cases—are brought all the time in the domestic legal system. The rules are sufficient to separate meritorious claims from frivolous claims." He adds, "The track record under NAFTA to date hardly demonstrates that arbitration tribunals have overstepped their bounds in protecting the rights of investors. To the contrary, the evidence to date shows that tribunals have taken a reasonable, balanced, and judicious approach in interpreting and applying the NAFTA investment provisions."

Even those with substantive criticisms of the MAI questioned the deployment of the Canadian case to illustrate the agreement's dangers. Stumberg faults "the American NGOs," which "went off citing this as the death of democracy in the United States. You don't get that from the Ethyl case." US officials also found the campaign troubling. As Papovich remembers:

> We thought that the concerns being expressed by NGOs were exaggerated and that view was confirmed when the Canadians settled the Ethyl case in provincial litigation and NGOs blamed NAFTA. In our view, even if there had been no NAFTA, Canada would have settled because they had acted in a manner inconsistent with their own interprovincial rules. That was the basis of the decision. NAFTA was irrelevant except that the complainant had chosen also to bring a corresponding complaint under the NAFTA "investor-to-state" dispute settlement provision. So, I believe the NGOs were grossly exaggerating or even distorting the situation.

Nevertheless, the core question—how the MAI would ensure that governments could exercise their standard regulatory powers without being charged with expropriation and then sued for compensation—continued to cause debate.[69]

NGOs brought up a host of other worries about the MAI as well, including its potential implications for human rights. Though few human rights organizations were involved in the initial campaign, some criticized the MAI for increasing investor rights without adding to investor responsibilities. The MAI would spell an end to boycotts and trade sanctions against countries that violated human rights standards, opponents declared. "Had the MAI been in force in the early 1980s," argued a Sierra Club publication, "there would have been no international sanctions against South Africa under apartheid, and Nelson Mandela might still be in jail."[70] MAI supporters found such claims incredible.

In addition to NGOs, some US states' rights groups, state attorneys general, and, most notably, the Western Governors' Association expressed concerns about the MAI. Robert Stumberg coauthored the MAI report for the Western Governors' Association, and he recalls that when he first read the draft text of the MAI, he "was just astonished. . . . It embodied a breathtaking scope of constitutional reform." The Western Governors' Association concluded that while the MAI might foster investment activity, it "may also have the effect of eroding the sovereignty of state governments."[71] According to Stumberg's report, the agreement had the potential to limit state policies favoring local businesses and to limit state use of investment incentives and performance requirements (Stumberg, Singer, and Orbuch 1997).

The early NGO efforts were largely a North American phenomenon. As the organizing effort against the MAI became more international, the lead NGOs created smaller, private electronic mailing lists for the core organizers of the various country-based campaigns. Again, according to Margrete Strand, the cyberconnection was essential: "That's where we would do our strategizing. Conference calls and international meetings are really expensive and hard to organize. It was cheaper and more effective to do it through the Internet." Some note that these acts of international coordination were unusual—NGOs have traditionally worked in their own domestic spheres.

69. Cases brought under NAFTA's Chapter 11 continued to cause controversy after the MAI talks had ended. In the most publicized case, Methanex, a Canadian methanol producer, sought nearly $1 billion over a California decision to ban the use of its methanol-based gas additive as harmful to the environment.

70. Paul Rauber, "All Hail the Multinationals: The Secret Trade Deal That Corporations Hope You Never Hear About," *Sierra Magazine*, July/August, 1998, 16.

71. See Western Governors' Association, Resolution 97-010 on the Multilateral Agreement on Investment and Implementation of Trade Pacts, June 24, 1997.

The OECD's Response

The reaction to this growing protest was surprise and, according to many, disbelief. The scale of the international grassroots fight was unprecedented against an economic agreement, observers said. While NGO-led protests had previously occurred domestically and regionally around trade and investment (as seen with NAFTA), international efforts (such as the Uruguay Round of GATT talks) had never been targeted with such ferocity.

The OECD was unprepared for such vehement NGO opposition; its officials did not expect to have to sell the MAI politically. "I think they thought it was going to be a slam dunk," says the USCIB's Steve Canner. "The OECD had been working on this stuff for years. They were all like-minded countries. What was there to worry about?" Previous OECD work on investment had been more akin to academic exercises, drawing the attention of only a circle of experts. Moreover, OECD officials believed they were undertaking an important, valuable exercise and were surprised by the angry response. As Papovich explains, OECD negotiators and officials "tend to be lawyers and economists who believe free trade is good for countries and investment liberalization is similarly good. Most trade negotiators were unprepared for dealing with people who fundamentally opposed what they did."

One way they responded to the NGOs was by opening up the MAI process to some extent. The first groups to oppose the OECD investment talks were Canadian. When the Canadian MAI negotiators approached Negotiating Group Chairman Frans Engering about the protests back at home, he took the situation seriously. Engering convened a meeting to discuss the appropriate response. At the May 1997 OECD ministerial, the initial target date for completion of the MAI, the talks were extended for one year with special instructions to consult with "civil society." In October 1997, the OECD held an informal consultation with representatives of about 50 NGOs.

In hindsight, one European negotiator believes that the OECD NGO consultations harmed the MAI effort because the meeting became an opportunity for protesters to make contacts and organize further. Indeed, he suggests that

> involving the NGOs may have been what sank the MAI. One personal feeling I have is that by inviting them to Paris in [the fall of] 1997, many of them met for the first time. They exchanged their cards. We helped them establish the connections, the network that in the end would bring down the MAI. When they came together nobody knew the other guys. I saw them in the antechamber saying, "Oh, that is you."

During the consultation, OECD officials and negotiators found many NGO arguments unfair. For one thing, OECD officials objected to their characterization of the talks. "Negotiations were not conducted in secrecy," insists Rainer Geiger, the OECD's deputy director for financial, fiscal, and enterprise affairs. "Ministers, not bureaucrats, decided to launch the process. Public information was available early in the process and business and trade unions were informed and consulted through their advisory bodies at OECD. Nonmember countries were aware of the MAI negotiations through regular briefings after each meeting of the Negotiating Group and were consulted through regional meetings held in Latin America, Asia, and Africa" (Geiger 1998, 474).

In addition, the outset of the talks had been announced with press conferences and public statements, though few press outlets had chosen to report on them. "Contrary to what has been alleged," one negotiator stresses, "the possibility that such negotiations would take place in the OECD, as also the decision to launch them, were entirely public. Although it can now be seen that a wider process of publicity and consultation would have been advisable, neither the governments concerned nor the OECD engaged in concealment at any stage" (Henderson 1999, viii). Many of the NGOs' allegations about the substance of the MAI were also viewed as hyperbolic and lacking any analytical rigor. However, MAI participants say that more reasonable NGO positions were taken into consideration. Consultations with environmental and consumer groups "helped identify critical issues and improved the draft," according to one observer.

Though some NGO representatives were interested in proposing changes to make the MAI more environmentally friendly, most apparently were not. Negotiators and other officials were frustrated by what they saw as an outright effort to kill the talks rather than to improve the agreement with productive suggestions. One observer remembers a US NGO representative telling negotiators, "We killed fast track and we're going to kill the MAI."

NGO leaders agree that the aim of many protesters was to stop the talks. "The majority of the NGOs decided to take a hard-line position saying 'We oppose these negotiations altogether,' " says Public Citizen's Margrete Strand. After meeting with OECD officials, the NGOs released a joint statement in October 1997; the signatories, about 600 organizations from around the world, called for the negotiations to be suspended while a comprehensive assessment of the social, environmental, and development impact of the MAI was conducted and meetings and hearings were held for the public.[72] The OECD made an attempt to continue the discussions, suggesting another meeting in January 1998, but NGO representatives declined the invitation.

Domestically, US government negotiators also met with NGO representatives—and continued to do so regularly, usually once every three months. Their discussions, which typically lasted a few hours, took place

72. Joint NGO Statement on the Multilateral Agreement on Investment (MAI), NGO/OECD Consultation on the MAI, Paris, October 27, 1997.

at the USTR or the State Department. The group sometimes included officials from the Commerce Department, the EPA, and the Justice Department as well. Outside of the meetings, Friends of the Earth and Public Citizen's Global Trade Watch hosted a US NGO working group on the MAI. Strand stresses their cooperation; when preparing for the government consultations, "We would always try to get members of the working group to go so that we could show the power as a coalition to the State Department and USTR. Obviously, it was better if we had the AFL-CIO, the Sierra Club, and other big groups in the room with us." Among the other NGOs that attended the meetings were the Alliance for Democracy, the Defenders of Wildlife, the Center for International Environmental Law, the Preamble Center, the Center of Concern, the National Family Farm Coalition, and the National Wildlife Federation.

None of the participants found the US domestic consultation process to be completely satisfying, however. On the NGO side, many felt the discussions were disingenuous. The government representatives were "very straightforward, as much as they could be," Strand says. "They're nice, friendly people. It's not like the meetings were hostile. It was a collegial forum where they pretended to seek our advice and get our input. Despite the friendly nature of the meetings though, it was clear that they didn't plan to take into account any of our concerns." On the government side, officials felt that the NGOs had little constructive advice to offer on modifying the agreement. Joseph Papovich (whose friendly and open demeanor won him the nickname "Uncle Joe" from the NGO representatives) describes the consultations as

> a very interesting process. The NGOs were very negative. They had a great deal of antipathy towards the MAI, so they really wouldn't give us much advice. They would ask us questions, some substantive questions, but they would rarely say, "We don't think you should do this," or "We don't think you should do that." It was a very strange consultation process[;] . . . they weren't interested in telling us, "Well, if you remove this provision the agreement might be more tolerable." They didn't want there to be an MAI—period!

In the meantime, US NGOs continued to organize public demonstrations against the MAI in Washington, DC, including rallies on Capitol Hill. In March 1998, the US House International Relations Subcommittee on International Economic Policy and Trade held a hearing on the MAI. Chairwoman Ileana Ros-Lehtinen (R-FL) commented that "for the last two years, there has been little, if any, substantive consultation with the Congress" on the negotiations.[73] In fact, as Graham notes, "the executive

73. Prepared statement by Representative Ileana Ros-Lehtinen, "Multilateral Agreement on Investment: Win, Lose, or Draw for the US?" hearing before the Subcommittee on International Economic Policy and Trade of the House Committee on International Relations, 105th Congress, 1st session, March 5, 1998.

branch established no process for consultation with Congress on the desirability of MAI negotiations" before the talks got under way. As a result, a number of legislators first learned about the MAI from NGOs (Graham 2000, 19).

MAI proponents continued to be frustrated by the lack of a coherent response to the charges levied by the NGOs. In the opinion of Canner,

> that was absolutely critical to the demise of the MAI. Most important and discouraging was that when the NGOs would make these silly statements—and I'm being generous in saying silly—there was no pushback from governments. They could have posted something on the Web. They could have had administration spokesmen dealing with this in the daily press briefings by the USTR and the State Department. But they chose not to take them on head-on.

Political controversy over the MAI was also growing in France. In French, the agreement is abbreviated AMI, which also means "friend." Opponents of the agreement mocked the acronym as a misnomer, saying "L'AMI c'est l'ennemi" (The friend/MAI is the enemy). One focus of criticism in France was the MAI's effect on culture. The French cultural minister, Catherine Trautmann, called the MAI

> shocking because it considers artistic works only as investments and not as creations. The mechanism the MAI would put into place would end up dismantling national policies supporting the arts and torpedo the creation of a European cultural policy. If MAI is applied to culture, it would upset everything—the system of supporting artistic works, distribution subsidies, the quota system for visual and musical works, and bilateral agreements we have signed with many other countries.[74]

Back at the Table

Some say that even before the NGO effort had peaked, the MAI was already facing the beginning of the end. "The growing pressure from civil society simply exacerbated the differences of opinion within the OECD," observed an official of the Belgian Foreign Trade Ministry (Kobrin 1998, 97). For example, disagreement had surfaced concerning how to introduce MAI provisions to safeguard environmental and labor standards. Pushed by the United States, Austria, and Britain, labor and the environment became major issues by the end of 1997. Opponents to incorporating these matters into the MAI included Australia and New Zealand as well as South Korea and Mexico. Some consensus emerged in the form of an agreement to maintain domestic environment and labor standards, an ap-

74. Trautmann, quoted in "France Wants Culture Out of OECD Investment Accord," *Reuters News*, February 14, 1998.

proach modeled on NAFTA.[75] But disputes over a central issue—whether this commitment not to lower standards would be a binding obligation—continued.

Further complicating the talks was the continuing absence of clarity regarding the most basic goals of the MAI effort. "Even through the final 12 months there were differing views about the ultimate objective," recalls one negotiator. Some parties wanted to focus on improving the standard of investment protection among OECD countries. Others believed that the negotiations should concentrate on creating a model agreement for developing countries, not on the investment relationship among OECD members.

According to some government officials, the negotiations also suffered from a lack of assistance from business. While business leaders thought the MAI was a good idea, some say, actual support for the agreement was anemic at best. As one European negotiator notes,

> In contested situations, governments are only effective if they are seen as being between different sides of the argument. If you have business on one hand calling for liberalization and if you have civil society on the other saying, "We want nothing but regulations on the environment," then government can say, "We'll try and find a middle ground." But with business saying nothing, we had only the concerns of civil society. So government came by definition to be seen taking an extremist view from the point of view of what was expressed in the public.

Others, including Daniel Price, see this as an unfair mischaracterization of business's role: "The business community was solidly behind the effort to negotiate the MAI. The fact is that international investment rules had never been particularly controversial. There was an expectation that the United States would strongly advocate the same position that it had during the negotiation of bilateral investment treaties and NAFTA. The business community believed that this was well-trodden ground not requiring any special advocacy on their behalf."

Yet after a few years of MAI negotiations, business clearly was questioning what kind of benefits the agreement could offer. At a January 1998 consultation, members of the Business and Industry Advisory Committee to the OECD criticized the proposed MAI as watered-down, pointing out that OECD members were refusing to liberalize their investment restrictions, that taxation should be included in the agreement, that environmental and labor standards were problematic, and that protections for expropriation were insufficient. While noting that business "was very interested

75. A 1998 OECD press release declared, "Ministers note the increased convergence of views on the need for the MAI to address environmental protection and labor issues, and the broad support for including a strong commitment by governments not to lower environmental or labor standards in order to attract or retain an investment." Press release, OECD Meeting at Ministerial Level, Paris, April 27–28, 1998, Ministerial Statement on the Multilateral Agreement on Investment (MAI), www.oecd.org.

in seeing this project succeed," the chairman of the BIAC delegation, Herman van Karnebeek, said that there were disturbing signs that many elements business hoped to see in the final agreement might not be attainable: "What then, we are beginning to ask ourselves, is in the MAI for us?" (ICC 1998). There were also worries that the agreement might create costly new barriers to FDI.[76] "With all the opposition [from environmentalists and states' rights activists] the question was, 'why expend all this energy?' " one business adviser asked (Maggs 1998, 3A).

Within the lead US government agencies, too, the purpose of the MAI was being debated. State Department officials envisioned the MAI as a freestanding agreement administered by the OECD, but USTR had concerns about this vision: For example, how would dispute settlement really work at the OECD? USTR was also concerned that the MAI would not attract the support needed to win approval in the US Senate. European negotiators noted the growing tensions between the State Department and USTR.

Some wondered if the MAI was truly a priority of the US administration. "That's really the first question to ask," says one observer. "Were they ever serious about this negotiation?" While the MAI was cleared by the White House and organized and monitored through an interagency process, critics held that no senior official ever really owned the negotiation and that the administration never geared up its lobbying effort. One source has the sense that "there was really no commitment from the top." In France, the MAI—especially its effect on culture—was the subject of widespread public debate. The Communists and the Green Party were especially vocal, and actors as well as members of political groups spoke out against the agreement. Some believe that the extent of the opposition to the MAI surprised and disconcerted political leaders. "It led them to question a commitment, and a process, which in the earlier stages they had barely noticed," says one MAI participant (Henderson 1999, viii).

Others suggest that the lack of high-level involvement was a reflection more of institutional arrangements at the OECD than of domestic leadership. The MAI talks took place among mid-level civil servants who, unlike more senior officials, did not have the authority or political power needed to make broad concessions and trade-offs. In addition, they did not have the ability to sell the MAI politically back at home. As Graham notes, "Most of the persons involved in the preparations for the talks were fairly junior and lacked experience with multilateral negotiations. Many were investment specialists in various ministries. . . . Often these specialists did not have easy access to higher-level officials inside their own governments." Indeed, the lack of commitment and participation of top political

76. Guy de Jonquières, "Worries over Planned Investment Accord," *The Financial Times*, Janu-ary 19, 1998, 5.

leaders "may have been critical to the outcome of the MAI negotiations" (Graham 2000, 17).

The OECD did hold a key MAI negotiation with senior officials. This high-level meeting was held in February 1998—just a few months before the annual OECD ministerial. In the lead-up to the talks, one European negotiator explains, participants knew that the MAI "was rather bogged down, but everybody thought we had a fighting chance. This was the last window of opportunity to get it through. Everybody tried to come up with some compromises, ways of creating value, or third ways to overcome the problems." Many negotiators hoped the meeting would help drive the MAI to completion by the upcoming ministerial.

But in a press conference just before the February meeting began, USTR Charlene Barshefsky declared, "We do not envision signing onto any agreement this April." Barshefsky called the MAI "unbalanced" and "prejudicial," saying it would require "very substantial, very substantial work to make it something the US will sign." "It's just not good enough yet," Barshefsky told reporters. "We have shown no hesitation in walking away from agreements that aren't very good."[77] Barshefsky noted that other OECD countries might proceed without the United States to try to wrap up a deal. But Prime Minister Lionel Jospin of France said there would be "no agreement" on the MAI if the French film industry was not given protection from US imports.

Despite these strong statements, OECD Secretary-General Donald Johnston said he remained "optimistic" that agreement would be reached by the OECD ministerial as planned.[78] But when officials arrived in Paris for the February meeting, the talk was about Barshefsky's press conference. "Have you heard what Barshefsky said?" one European Commission representative was overheard saying. "This thing is gone." Barshefsky's statement "overshadowed this last window of opportunity," according to an observer. Work continued, however. In the summary report of the February 16–17 meeting, the "Chairman's Conclusions" note: "The High Level Meeting made progress on the issues of political importance. . . . Delegations are ready to intensify their efforts to reach agreement on all outstanding issues" (OECD 1998a, 5).

In March 1998, Frans Engering announced that he would no longer serve as chairman of the MAI Negotiating Group as of May 1 (OECD 1998b, 3).

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77. Barshefsky is quoted in a number of wire reports of February 13, 1998; see, e.g., "France Says Not Certain of OECD Deal by April," Reuters News; "US Barshefsky Says US Not Ready to Sign MAI by April Deadline," AFX News; "USTR Barshefsky—2: MAI 'Not Good Enough' and 'Unbalanced,' " Dow Jones Newswires; "USTR Barshefsky—3: Pact with Philippines on Pork, Poultry," Dow Jones International News.

78. Jospin and Johnston quoted in Sue Kendall, "Increasing Pessimism Over International Investment Accord," Agence France Presse, February 13, 1998.

Engering said that the pressure of his responsibilities as a senior official of the Dutch Foreign Ministry made it impossible for him to continue.[79]

In April 1998, the OECD ministerial began, and on the 27th hundreds of activists staged an entire day of protest. Inside the meeting, OECD representatives agreed to a six-month "period of assessment and further consultation" at the request of France, Canada, and the United States. "We were not prepared to drive to a conclusion," remembers USTR's Papovich. Some remarked on the unusual alliance. "It was really quite fascinating to see France sit on the same side of the table as the United States," notes one observer. "All the European member states were on the other side, furious with the French." The MAI negotiations would begin again in October. This delay in the talks was hailed by the NGOs as a triumph for civil society and a direct result of the public opposition to the MAI (Human Rights Clinical Program 1999, 3).

Despite the claims of victory from NGO representatives, some observers say that the MAI would have stalled in any case. "NGOs captured the process to some extent," says Pierre Sauvé.

> But what they captured was a process teetering on the edge, with much of its body already over the cliff. All they did was nudge it into free fall. The MAI would have failed, in my view, even without an NGO crusade against it, because there were many profound contradictions in the draft itself. There's no doubt that NGOs used the MAI as target practice. It was a way for them to internationalize—to transnationalize. They realized that if they could create a dynamic of cooperation at the international level, they would have far more influence than by mounting a series of domestic opposition campaigns.

The End of the MAI

The MAI negotiations were scheduled to reconvene on October 20, 1998, after the six-month hiatus. In the meantime, the French government commissioned Catherine Lalumière, a member of the European Parliament, and Jean-Pierre Landau, the inspector general of finances, to prepare a report on the MAI. Observers note that Lalumière and Landau were not players in the MAI negotiations, nor were they particularly familiar with the OECD. While supportive of international investment rules and liberalization, their document—commonly known as the Lalumière Report—was critical of the structure and substance of the MAI. It concluded that the OECD was not created to serve as a forum for negotiating major international economic agreements and negotiations should not resume on the existing basis. The report also noted that "for the first time, we are witnessing the emergence of a 'global civil society' represented by nongovernmental organizations, which are often active in several countries and communicate across borders" (Lalumière and Landau 1998). The Lalumière report was released in September 1998.

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79. Guy de Jonquières, "Axe Over Hopes for MAI Accord," *The Financial Times*, March 25, 1998, 5.

In the lead-up to the October negotiations, anti-MAI forces ramped up their efforts. NGO representatives from 23 countries gathered at a strategy meeting in Geneva, and the AFL-CIO also issued a statement condemning the agreement. A rally was held outside UNCTAD headquarters that featured musicians, MAI opponents, and celebrity speakers.

On October 14, 1998—less than a week before talks were scheduled to resume—France announced that it was pulling out of the MAI negotiations, citing the Lalumière report to justify its withdrawal. France could not support "abandoning sovereignty to private interests under the pretext of an international investment code," Prime Minister Jospin told the national assembly. "France will not take part in the OECD negotiations on October 20. We want the negotiations to resume on a totally new foundation and in a framework that includes all participants, that is all countries, including developing nations." Jospin added that the proposed accord was of limited interest to French companies and that the right framework for the talks was "quite naturally that of the WTO."[80]

The manner of the French withdrawal—a sudden and public exit—was viewed as unusual for a multilateral negotiation. Parties generally negotiated how a set of talks would close. Observers suggest that Jospin may have used the dramatic departure to shore up his domestic support and prevent the controversy surrounding the MAI from aiding the Green Party and the Communists.

Following Jospin's statement, a spokeswoman for the OECD said there were no plans to cancel the October 20 relaunch of the negotiations, declaring, "You can't cancel a meeting just because one sovereign state pulls out."[81] However, the OECD downgraded the scheduled two-day "negotiation" to one day of "consultation." Ultimately, without France, EU member states would not continue the negotiations; and without the European Union, there could be no talks (Dymond 1999, 25). Still vigilant, NGOs released a joint statement in November titled "A Call to Reject Any Proposal for Moving the MAI or an Investment Agreement to the WTO."[82]

On December 3, 1998, following efforts by the OECD Secretariat to resuscitate the MAI, the OECD released a statement: "Negotiations on the MAI are no longer taking place."[83]

80. Jospin, quoted in David Pearson, "France Torpedoes OECD Talks on Global Investment Accord," "France/OECD Talks—2: Wants to Shift Talks to WTO," "France/OECD Take 3: Third World Groups Criticize Talks," Dow Jones International News, October 14, 1998.

81. Quoted in Pearson, "France/OECD Talks—2: Wants to Shift Talks to WTO," Dow Jones International News, October 14, 1998.

82. This letter is widely available on the Web; see, e.g., www.citizen.org.

83. Christopher Noble, "OECD Admits Global Investment Treaty Dead," Reuters News, December 4, 1998.

Conclusion

Some believe that the downfall of the MAI represents the first major victory by the civil society groups that would later gain force in protesting economic globalization and international trade efforts by the WTO, the World Bank, and the IMF. On this view, the MAI campaign is particularly significant in providing the momentum for the protests during the 1999 WTO ministerial in Seattle.

Others insist that what really sank the MAI was the initial decision to negotiate an agreement between countries with well-established foreign investment policies—and the subsequent choice of the OECD as a negotiating forum. While many assumed that OECD countries could easily assemble a high-quality agreement, some believe that the talks lacked enough substance for a productive negotiation. In the end, says one participant, the MAI's "fatal weakness" was that "OECD countries had few investment barriers whose removal was negotiable or worth the effort." Therefore, negotiators came to the table "determined to offer nothing beyond the maintenance of current regimes" (Dymond 1999, 26).

As the talks progressed, the MAI faced both internal and external problems. Internally, various issues proved more contentious and difficult to negotiate than had been expected. Externally, anti-MAI NGOs organized an international movement against the agreement, and the OECD, a traditionally low-profile organization, was forced into the public eye in a way it had not anticipated. Some believe that as each of these challenges grew stronger, the two dynamics became mutually reinforcing and overwhelmed the MAI effort (Henderson 1999, 21).

The demise of the MAI talks did not signal an end to interest in negotiating a multilateral investment agreement, however. In a Working Group on Trade and Investment was founded at the WTO during the Singapore Ministerial Conference. Other major new "Singapore issues" introduced during the ministerial were transparency in government procurement, competition, and trade facilitation. In the run-up to the 1999 Seattle ministerial, the European Union, Japan, and several developing countries strongly urged that what they called "modest investment negotiations" be initiated at the WTO. "It's interesting," reflects one observer. "While I feel that the MAI was a US idea, the mantle has now been picked up by the European Union and Japan."

But any movement on investment issues at the WTO would be hard-won. Discord surrounded the implementation of the TRIMS agreement signed during the Uruguay Round. Although developing countries were to come into compliance by 2000 and the least developed countries by 2002, several countries submitted requests for deadline extensions, saying they needed more time to make the substantial policy reforms required by the agreement.

Controversy over multilateral investment rules persisted at the 2001 WTO ministerial in Doha, Qatar, which kicked off a new round of trade talks. In September 2003, WTO negotiations broke down at the Cancún ministerial when developing countries refused to talk about investment and the other Singapore issues put forward by Europe and Japan. Brazil, India, and China led an "unlikely coalition" of more than 20 developing nations that banded together to argue that EU and US agricultural proposals fell far short of their expectations.[84] With few assurances that developed nations would slash their $300 billion in domestic farm subsidies, developing countries had little interest in pursuing new rules such as those on investment. "Developing countries do not have the capacity to deal with the new issues. We are still grappling with [WTO negotiations] on agriculture and non-agricultural products," noted Indonesia's trade minister, Rini Mariani Sumarno.[85] "We wanted to negotiate issues that are essential for us—agriculture subsidies, closed markets," said Yashpai Tandon, a delegate from Uganda. "Why would we now add investment? It is too much."[86]

Negotiation Analysis of the Case

Failure often is instructive, and the MAI negotiations therefore provide an opportunity for learning. Some have credited a strong campaign by nongovernmental organizations with torpedoing the MAI effort; but though energetic opposition from NGOs played a role in the demise of the negotiations, the groundwork for failure was laid much earlier. As the analysis below elucidates, fundamental weaknesses in the structure of the talks, the selection of the OECD as the negotiating forum, and the design of the process raised formidable barriers to agreement.

Element #1: Organizing to Influence

While the extent of their impact on the negotiation process can be disputed, the NGOs did a brilliant job of mobilizing global opposition to the MAI. Their campaign is a dramatic example how the Internet has enabled previously fragmented groups to be knit together into a powerful movement. The NGOs successfully used the Internet as an *influence lens,* a tool

84. Scott Miller and Neil King Jr., "Poor Countries May Hold Sway in WTO Session—Group Opposed to Supports for Rich-World Farmers Wields Newfound Clout," *The Wall Street Journal*, September 11, 2003, A11.

85. Sumarno, quoted in Guy de Jonquières and Frances Williams, "WTO Talks Collapse Without Agreement," *The Financial Times,* September 15, 2003, 1.

86. Tandon, quoted in Elizabeth Becker, "Poorer Countries Pull Out of Talks over World Trade," *The New York Times,* September 15, 2003, A1.

that can gather diffuse rays of support and focus them on key points. The NGOs also had a clear, simple goal: They sought to stop the negotiations altogether, not to incorporate certain issues or language into the agreement. Some have criticized the NGOs for lacking substantive knowledge about investment and for disseminating misinformation (including misquotes), but these groups were undeniably very effective in getting out their core message and rallying support for their cause.

At the same time, proponents of the MAI failed to organize to influence key constituencies and decision makers. They handled public relations poorly (as discussed in the section on framing below), and their efforts to build momentum were undermined by the failure of the participating governments to claim ownership and be involved at sufficiently high levels. Bureaucratic politics within the US administration also played a role in undermining the talks, as did lackluster support by the business community. The NGOs may have only put the nails in the MAI's coffin, but they were able to claim a victory that gave them momentum as they planned protests for the WTO ministerial in Seattle.

Element #2: Selecting the Forum

One reason for the selection of the OECD, an organization of mostly developed countries, as the forum to host the MAI negotiations was the perception that efforts to address investment issues within the WTO had fallen short because of resistance from developing nations. The OECD had a long history of facilitating the making of investment codes, particularly within its Committee on International Investment and Multinational Enterprise. The OECD thus had the requisite technical expertise and institutional credibility to host the talks; moreover, some groups within the OECD had advocated for such an agreement.

Besides, there were simply not many plausible alternatives to the OECD. The International Monetary Fund might have been a candidate, and indeed in the mid-1990s it had argued that because FDI is capital flow, it was the logical place to negotiate the agreement. But the Fund had limited organizational experience as a negotiating forum. The United Nations Conference on Trade and Development, another possibility, had little experience with organizing negotiations and, perhaps more important, was seen by some as a hotbed of antimultinational fervor. The only other option would have been to create an entirely new forum.

Unfortunately, the choice of the OECD proved highly problematic. First, the OECD lacked the process expertise needed to run a complex, multiparty negotiation. Because of its technical and research mindset, the OECD was insufficiently sensitive to process design and seemingly unprepared to conduct the public diplomacy required to support negotiations over such a contentious set of issues.

In addition, its selection both reflected and exacerbated internal political struggles within the US administration over the making of trade policy—historically the purview of USTR, while international investment policy had been under the control of the Departments of Treasury and State. To the extent that investment was subsumed into a multilateral trade agenda and negotiated in the WTO, the USTR gained influence. By anchoring negotiations over investment in the OECD, Treasury and State remained in charge. But this control came at the cost of internal consensus within the United States and even of opposition by some elements in USTR.

Element #3: Shaping the Agenda

The MAI talks were explicitly designed to involve a limited set of parties (developed countries) negotiating over a limited set of issues (investment rules), a structure motivated by two primary factors. The first was the logic of sequencing. Many believed that OECD members would generally agree on what investment rules were desirable. Once they had negotiated an agreement, they could put forward the MAI as the model for a broader agreement to which developing countries would accede in time.

However, there were significant differences in developed countries' investment rules, shaped largely by domestic political realities, which were not easy to overcome. These included variation in the treatment of cultural industries, the power of subfederal governments (e.g., the ability of US states to create their own investment incentives), and the treatment of industries deemed critical to national security and development. In negotiations with a broader agenda such differences might have been welcome grist for cross-issue or cross-sector trades, but at the OECD they simply became blocks to agreement. The top-down agreement design, which made it difficult to opt out of provisions, only exacerbated the tension.

The MAI agenda also intended to hit a sweet spot in its breadth and complexity. By focusing on the full range of investment issues, negotiators hoped to craft an agreement broad enough to permit trades across issues, but not so broad that it couldn't be negotiated in a reasonable amount of time. But the focus on investment forestalled the creation of linkages to a wider range of trade-related issues. For example, a country could not make a concession on investment in exchange for a desired outcome in agricultural tariffs.

The negotiators therefore had great difficulty making value-creating trades. The talks were further complicated by the reluctance of each party to concede anything, while insisting on concessions from others. This dynamic grew out of the inadequate negotiating authority of the MAI participants, who were generally midlevel civil servants without the power to commit to many domestic policy changes.

Element #4: Building Coalitions

This case is really all about coalition building (and breaking). For the reasons described above, the facilitators and participants in the MAI process were not able to build a winning coalition and reach a final agreement. The MAI's opponents, in contrast, successfully organized a vocal coalition and helped to catalyze France's departure from the negotiations, precipitating the breakdown of the process. Negotiation organizers even unwittingly provided opportunities for the MAI's implacable foes to meet and make connections beyond their efforts on the Internet. Providing such an opportunity for opposition efforts to coalesce is a classic mistake.

Element #5: Leveraging Linkages

The organizers of the MAI negotiations may have thought they had learned the needed lessons from prior failures and successes in negotiating investment agreements. Because bilateral investment treaties had yielded a patchwork of agreements between developed and developing countries, MAI proponents believed that the time had come to more broadly harmonize international rules on investment. But they might also have observed that business interests seemed largely satisfied with the BIT process, suggesting that no dramatic groundswell of business support for negotiating improved protections could be expected.

Lessons had also been gleaned from linked efforts to advance the investment agenda in the GATT. Developing countries were resistant to including investment in the GATT, fearing that by doing so they would lose control of a key lever of domestic and development policy. Though some progress on investment had been made in the Uruguay Round through the TRIMs and GATS negotiations, these agreements were seen as incremental and watered-down. Therefore, proponents of a multilateral investment agreement viewed negotiating outside of the WTO as the best plan. But another important lesson from GATT efforts was that developed countries had their own disagreements over issues such as investment in culturally sensitive industries.

At the same time, prior efforts to negotiate narrow investment-related agreements at the OECD offered their own lessons. The OECD had created Codes of Liberalization, but they lacked any binding enforcement mechanism—and the one attempt by the OECD to negotiate a binding National Treatment Instrument had ended in failure in 1991. Negotiators therefore deduced that the agenda for future negotiations needed to be broadened to encompass the full range of investment issues, apparently failing to observe that closing the remaining gaps in investment policy between OECD members would not be easy.

Lessons had also been learned from NAFTA. Proponents of the MAI saw NAFTA's Chapter 11 as a success story: investment rules worked out in the context of a regional agreement. Because the United States and Canada had made investment commitments to each other, Chapter 11 was understandably held up as a model for what could be achieved through negotiation between developed countries. This model made plausible the notion that negotiating a broad investment agreement among a set of developed nations would move the investment liberalization agenda forward. Some argue, however, that such a conclusion overlooks an important factor in NAFTA: that Canada and the United States had entered into the negotiation more motivated to liberalize investment with Mexico than with each other.

In short, some lessons from past linked investment negotiations were noted by MAI proponents, but other lessons were disregarded.

Element #6: Playing the Frame Game

When it came to the frame game, participants in the MAI process essentially left the field, giving the NGOs and other opponents free rein. The NGOs employed framing tactics very effectively to mobilize other activists, painting the agreement as "NAFTA on steroids" and "the biggest power play yet of the global mega-corporations." At the same time, they succeeded in shaping broader public perceptions by accusing MAI negotiators of secrecy and conspiracy. Opponents used evocative language such as "the Dracula test" to drive home their concerns, and they also played up potential risks to national sovereignty. The ads about a "top-secret" agreement, the leaked MAI draft, and the spinning of the Ethyl case all contributed to the mainstream press picking up the story in ways that favored the opponents' interpretation of the negotiations.

Some government officials believed that business did not push hard enough for the MAI in the public arena. Such public support from business was needed, they argued, for negotiators to be seen as mediating between the two competing sides (business and NGOs). For their part, some business representatives claimed that government officials did not do enough to counter the arguments of the NGOs. The meeting between officials and NGO organizers to discuss substantive issues, for example, was in fact counterproductive, for in reality the NGOs had no desire to modify the agreement, only a wish to stop it. Government officials might have been better served by taking their arguments to the general public. OECD organizers, coming from a culture in which the benefits to society of their efforts were assumed to be obvious, were similarly unprepared to argue their case publicly. MAI proponents thus failed to create a public relations strategy to help educate the press and key publics about the MAI process and the benefits of the agreement.

Element #7: Creating Momentum

Finally, MAI organizers failed to create the momentum necessary to reach agreement. A potentially powerful logic of sequencing underpinned the design of the MAI process, but that potential was not realized. The expectation was that developed countries would first negotiate among themselves to create a common position, thereby setting high standards for subsequent negotiations with developing countries. The agreement would include an accession mechanism to entice developing countries interested in attracting investment. The result would be a "race to the top," increasingly isolating most developing countries that were opposed to the agreement. Association with the WTO would come in due course—that is, when momentum toward agreement became unstoppable.

In addition, the MAI process was designed to move from negotiations over a framework to negotiations over details. The agenda was divided into six groups of issues, and working groups (patterned on the standard OECD structure) were established for each issue. Each working group was intended to develop common understandings as a prelude to constructing the broader framework. One weakness with this process strategy was that an initial phase of negotiations on goals and principles was not fully undertaken. Therefore, the most fundamental question about the goal of the MAI—whether it should establish an initial lowest-common-denominator agreement or instead push forward liberalization dramatically, beyond even Chapter 11 of NAFTA—was never answered. A related problem was that key decision makers and major political figures had not sufficiently bought into the process. As a consequence, the working groups fostered only parallel discussions of narrow sets of issues with inadequate overall integration.

The MAI negotiations also provide numerous examples of the strategic use of action-forcing events by opponents and participants. Charlene Barshefsky's public comments about the negotiations and the French exploitation of the Lalumière Report as an excuse to withdraw from the talks demonstrate how participants can deploy action-forcing events to slow or end negotiations.

Conclusion

Before we close the book on the MAI, we must remember that negotiations are linked in time. A number of parties are still interested in creating multilateral rules on investment. How the MAI experience will inform future efforts remains to be seen.

Appendix 4A
Agreement on Trade-Related Investment Measures (1995)

Members,

Considering that Ministers agreed in the Punta del Este Declaration that "Following an examination of the operation of GATT Articles related to the trade-restrictive and distorting effects of investment measures, negotiations should elaborate, as appropriate, further provisions that may be necessary to avoid such adverse effects on trade";

Desiring to promote the expansion and progressive liberalisation of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners, particularly developing country Members, while ensuring free competition;

Taking into account the particular trade, development and financial needs of developing country Members, particularly those of the least-developed country Members;

Recognizing that certain investment measures can cause trade-restrictive and distorting effects;

Hereby *agree* as follows:

Article 1: Coverage

This Agreement applies to investment measures related to trade in goods only (referred to in this Agreement as "TRIMs").

Article 2: National Treatment and Quantitative Restrictions

1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.

2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.

Article 3: Exceptions

All exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement.

Article 4: Developing Country Members

A developing country Member shall be free to deviate temporarily from the provisions of Article 2 to the extent and in such a manner as Article XVIII of GATT 1994, the Understanding on the Balance-of-Payments Provisions of GATT 1994, and the Declaration on Trade Measures Taken for Balance-of-Payments Purposes adopted on 28 November 1979 (BISD 26S/205-209) permit the Member to deviate from the provisions of Articles III and XI of GATT 1994.

Article 5: Notification and Transitional Arrangements

1. Members, within 90 days of the date of entry into force of the WTO Agreement, shall notify the Council for Trade in Goods of all TRIMs they are applying that are not in conformity with the provisions of this Agreement. Such TRIMs of general or specific application shall be notified, along with their principal features.

2. Each Member shall eliminate all TRIMs which are notified under paragraph 1 within two years of the date of entry into force of the WTO Agreement in the case of a developed country Member, within five years in the case of a developing country Member, and within seven years in the case of a least-developed country Member.

3. On request, the Council for Trade in Goods may extend the transition period for the elimination of TRIMs notified under paragraph 1 for a developing country Member, including a least-developed country Member, which demonstrates particular difficulties in implementing the provisions of this Agreement. In considering such a request, the Council for Trade in Goods shall take into account the individual development, financial and trade needs of the Member in question.

4. During the transition period, a Member shall not modify the terms of any TRIM which it notifies under paragraph 1 from those prevailing at the date of entry into force of the WTO Agreement so as to increase the degree of inconsistency with the provisions of Article 2. TRIMs introduced less than 180 days before the date of entry into force of the WTO Agreement shall not benefit from the transitional arrangements provided in paragraph 2.

5. Notwithstanding the provisions of Article 2, a Member, in order not to disadvantage established enterprises which are subject to a TRIM notified under paragraph 1, may apply during the transition period the same TRIM to a new investment (*i*) where the products of such investment are like products to those of the established enterprises, and (*ii*) where necessary to avoid distorting the conditions of competition between the new investment and the established enterprises. Any TRIM

so applied to a new investment shall be notified to the Council for Trade in Goods. The terms of such a TRIM shall be equivalent in their competitive effect to those applicable to the established enterprises, and it shall be terminated at the same time.

Article 6: Transparency

1. Members reaffirm, with respect to TRIMs, their commitment to obligations on transparency and notification in Article X of GATT 1994, in the undertaking on "Notification" contained in the Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance adopted on 28 November 1979 and in the Ministerial Decision on Notification Procedures adopted on 15 April 1994.
2. Each Member shall notify the Secretariat of the publications in which TRIMs may be found, including those applied by regional and local governments and authorities within their territories.
3. Each Member shall accord sympathetic consideration to requests for information, and afford adequate opportunity for consultation, on any matter arising from this Agreement raised by another Member. In conformity with Article X of GATT 1994 no Member is required to disclose information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 7: Committee on Trade-Related Investment Measures

1. A Committee on Trade-Related Investment Measures (referred to in this Agreement as the "Committee") is hereby established, and shall be open to all Members. The Committee shall elect its own Chairman and Vice-Chairman, and shall meet not less than once a year and otherwise at the request of any Member.
2. The Committee shall carry out responsibilities assigned to it by the Council for Trade in Goods and shall afford Members the opportunity to consult on any matters relating to the operation and implementation of this Agreement.
3. The Committee shall monitor the operation and implementation of this Agreement and shall report thereon annually to the Council for Trade in Goods.

Article 8: Consultation and Dispute Settlement

The provisions of Articles XXII and XXIII of GATT 1994, as elaborated and applied by the Dispute Settlement Understanding, shall apply to consultations and the settlement of disputes under this Agreement.

Article 9: Review by the Council for Trade in Goods

Not later than five years after the date of entry into force of the WTO Agreement, the Council for Trade in Goods shall review the operation of this Agreement and, as appropriate, propose to the Ministerial Conference amendments to its text. In the course of this review, the Council for Trade in Goods shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy.

ANNEX
Illustrative List

1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:
   (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or
   (b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.
2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:
   (a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;
   (b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or
   (c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.