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The Rise and Fall of the Multilateral Agreement on Investment: Where Now?

PETER T. MUCHLINSKI*

The increasing integration of global business through both international trade and foreign direct investment (FDI), conducted in the main by multinational enterprises (MNE), has given rise to a new agenda of regulatory questions. In the pursuit of answers to these questions, new regimes, by which international business can flourish, may develop. At the same time, not only business and economic issues but also social issues arise. These include, at a minimum: protection of the environment, observance of minimum labour and human rights standards, and development of the least developed countries and regions.[1] Such matters raise further questions going to the heart of the type of regime that will emerge. Will such a regime be limited to a narrow, "top down" economic model aimed at the progressive liberalisation of trade and investment rules incorporating what some have termed a "New Constitutionalism" that imposes discipline on public institutions to prevent national interference with the property right, and entry and exit options of mobile corporate capital?[2] In the alternative, will it offer a "bottom up" approach in which the interests of societies at large, in the good governance of private enterprise, will be protected alongside economic liberalisation through the regulation, by nation states and intergovernmental organisations, of the types of social issues listed above? This debate raises the core question of how to establish a politically acceptable balance between business liberalisation and legitimate social regulation by public institutions. The present paper aims to contribute to that debate by examining the rise and fall of the draft Multilateral Agreement on Investment (MAI), which was negotiated unsuccessfully under the auspices of the Organization for Economic

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1. *See* Kofi Annan, Development of Guidelines on the Role and Social Responsibilities of the Private Sector: Report of the Secretary-General, Address at the World Economic Forum (Jan. 31, 1999); U.N. GAOR, Doc. A/AC.253/21 (2000) (transcript available in U.N. Doc. SG/SM/6881/Rev.1).

2. *See* Stephen Gill, *Globalisation, Market Civilization and Disciplinary Neo-Liberalism*, 24 MILLENNIUM 399, 413 (1995).

Co-operation and Development (OECD). Furthermore, it should be noted that the proposed adoption of multilateral investment rules in the Millenium Round of multilateral trade negotiations was also opposed by several delegations, and by civil society groups, at the World Trade Organization (WTO) Seattle Ministerial in November 1999.[3]

Accordingly, a close examination of why such rules have been virtually impossible to negotiate (notwithstanding the present trend towards the liberalisation of national investment laws and regulations[4]) should offer insights into what needs to be done for a future multilateral investment regime to be successfully put into place. Despite the failure of the Seattle Ministerial, the British government and the European Commission continue to favour the adoption of multilateral investment rules by the WTO as part of a comprehensive round of negotiations that would not only consider trade and investment but also include competition policy, government procurement, industrial tariffs, labour rights, and the environment.[5] However, even if investment does not appear on any future negotiating agenda, the issues raised by the MAI will continue to influence developments in bilateral and regional investment negotiations. Therefore, an understanding of its shortcomings is useful in a more general context.

This paper contains three sections. Section I considers the background to international negotiations for International Investment Agreements (IIA). The MAI has a clear historical lineage, which shows the problems involved in trying to conclude an IIA, and which helps to account in part for its failure. Section II looks at the contents of the MAI, focusing on the major issues that caused the negotiations to stumble. Section III draws together some conclusions from the preceding sections and considers what lessons can be learned from them.

I. The Background to the MAI

Demands for international business protection and regulation are far older than one might imagine.[6] In regard to trade and investment in colonial territories, such demands would not have been made in the context of international law. The control over colonial laws, regulations, and administration exercised by the political and executive institutions of the imperial sovereign could ensure the requisite degree of legal and administrative certainty for an effective reduction of business risk. This control would be backed up, where necessary, by imperial military power. On the other hand, in relation to non-colonial territories, the maintenance of a system of order that could reduce business risk was more problematic. The use of direct force was an option and was, on numerous occasions, applied. However, such direct action could not stand the scrutiny of a more modern political order based on the rule of law. Thus, it is not surprising to find that new principles of international law, dealing with the treatment of aliens and their property, began to emerge from the state practice of the principal Western powers in relation to disputes with independent countries

3. *See* John Vidal, *Secret World of WTO Deal Makers*, THE GUARDIAN, Dec. 3, 1999, at 1–2.

4. *See World Investment Report 1999* at 115–17, U.N. Doc. TD/UNCTAD/WIR/1999.

5. *See* Clare Short, *Lifting One Billion People out of Poverty: The Role of Trade and Investment*, Address at UNCTAD X Bangkok (Feb. 16, 2000); *EC Commission Seattle Conference Preparation: EC Approach to Trade and Investment* (Apr. 2000), *available at* http://www.europa.eu.int/comm/trade/2000round/1806i.htm.

6. *See* Peter T. Muchlinski, *A Brief History of Regulation*, *in* REGULATING INTERNATIONAL BUSINESS: BEYOND LIBERALISATION 47 (Sol Picciotto & Ruth Mayne eds., 1999).

that were hosts to foreign traders and investors.[7] The aim was to establish rules that would be binding on such host countries as subjects of international law. The presence of such rules would ensure a degree of proper conduct towards traders and investors from the Western powers through the threat of international claims by these powers of violations of such rules by host countries.

From this practice emerged the concept of international minimum standards of treatment for aliens and their property, developed in the nineteenth century by the major western European powers and the United States.[8] Two principles in particular stand out: first, the property of foreigners could not be taken without due process of law and without prompt, full, and effective compensation; second, contractual relations entered into between host states and private foreign investors were to be accorded the utmost respect, requiring the preservation of the bargain even where its terms proved to be disadvantageous to the host state.

These principles were challenged by a number of political and associated legal developments. Thus, the independence movement in Latin America in the nineteenth century gave rise to the Calvo Doctrine. This doctrine influenced Latin American resistance to international minimum standards in the late nineteenth century and much of the twentieth century, on the basis that foreign investors were entitled to treatment no better than that accorded to domestic investors. Secondly, the rise of socialism and its delegitimation of private property rights helped to undermine the accepted Western views of the sanctity of contract and property. Thirdly, the decolonisation movement in Europe after World War I and in Africa and Asia after World War II led to greater demands for economic self-determination and, with it, a reinforcement of the state's sovereign right to regulate national economic policy within its borders.

The result of these challenges generated uncertainty as to the content of customary international law in the field of foreign investment. This uncertainty was reinforced in the early 1970s by demands for greater control over national economic policy made by the developing countries under the New International Economic Order. However, one area has remained certain: all states have accepted the right to control the entry and establishment of foreign investors into the territory of the receiving state unless the latter is bound by treaty to accord such rights to investors.[9]

Amid such growing uncertainty, attempts have been made since the late 1920s to develop an agreed international code for the regulation of foreign investor/host state relations.[10] These can be divided between attempts to conclude a binding international investor protection convention and attempts to reconcile the interests of investors for protection with the interests of states to control investors acting in the national interest.

In the first category, there were numerous unsuccessful initiatives undertaken by the League of Nations between 1929 and 1930. However, the most influential initiative came from private sector interests in the United Kingdom and Germany, which led to the conclusion of the "Abs-Shawcross" draft convention in 1959. This convention was taken up by

7. *See* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 8 (1994).

8. *See* CHARLES LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES (1985).

9. *See Admission and Establishment*, 1999 UNCTAD Series on Issues in International Investment Agreements at 7–14, U.N. Doc. TD/UNCTAD/ITE/IIT/10/Vol. II [hereinafter *Admission and Establishment*].

10. *See, e.g.*, PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 573 (rev. ed., 1999); Muchlinski, *supra* note 6.

the then Organisation for European Economic Cooperation (OEEC), now OECD, for consideration. It led to the OECD Draft Convention on the Protection of Foreign Property of 1962.[11] However, this draft was never adopted, due to opposition from the less developed south European Member countries. In 1967, the Council of the OECD, by a resolution adopted on October 12, 1967, commended the draft convention to Member States as a model for bilateral investment protection treaties (BIT) and as a basis for ensuring the observance of the principles of international law that it contained. Such bilateral treaties—of which there are in excess of 1,300—have been highly influential in the development of investor protection standards and may be regarded as a significant source of such standards for the MAI.[12] Indeed, the MAI was often "sold" as a "multilateralisation" of BITs with some additional provisions.

Alongside the abortive attempt to adopt the Convention, the OECD also initiated a policy on the progressive liberalisation of capital flows under the Codes of Liberalisation of Capital Movements and Current Invisible Operations of 1961.[13] These instruments committed the members to the progressive removal of barriers to cross-border capital transactions as specified in the Liberalisation Lists appended to each Code. Of particular importance to the future development of the MAI was the 1984 introduction of a right of establishment into the Code on Capital Movements.[14] This was based on a prohibition against the maintenance or introduction of regulations or practices in relation to the granting of licences, concessions, or similar authorisations, including conditions or requirements attached to such authorisations, that would affect the operations of enterprises by raising special barriers or limitations with respect to nonresident as compared to resident investors, and that have the intent or effect of preventing or significantly impeding inward direct investment by nonresidents.

More recent developments that have also provided sources for MAI provisions include the North American Free Trade Agreement (NAFTA), which exemplifies the North American model of investor promotion and protection with its distinctive feature of including pre-entry as well as post-entry protection for foreign investors; the 1994 Energy Charter Treaty (ECT), an experiment in multilateral standard-setting for trade and investment in a specific industrial sector; and the 1994 WTO Agreements dealing with investment-related issues, namely, the General Agreement on Trade in Services (GATS), the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIP), and the agreement on Trade Related Investment Measures (TRIM). In addition, there have been some notable institutional developments, adopted under the auspices of the World Bank, aimed at furthering the protection of investors. These include the 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,[15] which

11. Organisation for Economic Co-operation and Development Draft Convention on the Protection of Foreign Property, Oct. 12, 1967, O.E.C.D. Pub. No. 23081, 7 I.L.M. 5.

12. *See generally* BILATERAL INVESTMENT TREATIES IN THE MID-1990s, U.N. Doc. TD/UNCTAD/ITE/IIT/7 (1998).

13. OECD CODE OF LIBERALISATION OF CURRENT INVISIBLE OPERATIONS, OECD/C(61)95 (1977); OECD CODE OF LIBERALISATION OF CAPITAL MOVEMENTS, OECD/C(61)96 (1990).

14. CODE OF LIBERALISATION OF CAPITAL MOVEMENTS, at Annex A, *available at* http://www.oecd.org/daf/investment/legal-instruments/clcmoper.htm.

15. International Centre for Settlement of Investment Disputes (ICSID) would be one option under the MAI. The aim was to offer the investor a variety of options including the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules and recourse to the ICC. *See infra* notes 64–70 and accompanying text.

provided a possible model for the dispute settlement provisions of the MAI, and the 1985 Multilateral Investment Guarantee Agency Convention.

In the second category, the most significant historical example is the Charter of the International Trade Organisation (Havana Charter) completed on March 24, 1948, in Havana, Cuba.[16] The Havana Charter contained a number of provisions relevant to the regulation of foreign investment by corporations, including proposals for the control of restrictive business practices, provisions protecting the security of foreign investments, and an assertion of the right of capital-importing states to control the conditions of entry and establishment, of inward investment. These provisions caused widespread opposition to the Havana Charter among business interests and led to its demise when the United States and other signatory states did not ratify it.[17]

More recently, in the 1970s, numerous negotiations commenced for the adoption of codes of conduct for MNEs. International organisations began to accept the legitimacy of claims by capital-importing states for greater control over the conditions of entry and establishment and over the subsequent conduct of foreign investors within their territory. The balancing of the interests of private foreign investors and those of the host state, first attempted in the abortive Havana Charter, became the basis for these new codes of conduct for MNEs. The most significant initiative was the UN Draft Code of Conduct on Transnational Corporations.[18] It was never adopted. Nonetheless, its contents continue to inform the debate on how corporate responsibility issues should be formulated in IIAs.[19] More successful was the ILO initiative, which led to the 1977 adoption of the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy.[20] Equally in 1976, the OECD Guidelines on Multinational Enterprises were adopted. These contain the most comprehensive set of responsibilities for MNEs but are not legally binding. They should be read alongside the OECD Declaration on International Investment and Multinational Enterprises, which contains references to national treatment and international law. These guidelines have just been revised, and the new version was adopted at the end of June 2000.[21] Finally, mention should be made of the 1992 World Bank Guidelines on the Treatment of Foreign Investment. These guidelines are aimed at investor protection, but significantly, they accept the right of host states to control the entry and establishment of foreign investors.[22]

II. The MAI and Its Failure

The history of discussions regarding the rights of investors and their protection has raised a number of hitherto unresolved issues concerning multilateral investment rules: should

16. *See* UNCTAD INTERNATIONAL INVESTMENT INSTRUMENTS: A COMPENDIUM at 3-13, U.N. Doc. TD/UNCTAD/DTCI/30/Vol. I. (1996) [hereinafter COMPENDIUM].

17. *See* Lipson, *supra* note 8, at 86–87.

18. *See* COMPENDIUM, *supra* note 16, at 161–80.

19. *See, e.g.*, *Report (1998) of the Working Group on the Relationship Between Trade and Investment to the General Council*, at 51–62 ¶ 191–225, WTO Doc. WT/WGTI/2 (1998).

20. *See* COMPENDIUM, *supra* note 16, at 89–103.

21. *See* OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES—Text (2000), *available at* http://www.oecd.org/ daf/investment/guidelines/mnetext.htm.

22. *See* COMPENDIUM, *supra* note 16, at 247–55; Sabine Schlemmer-Schulte, *The World Bank Guidelines on the Treatment of Foreign Direct Investment*, *in* LEGAL ASPECTS OF FOREIGN DIRECT INVESTMENT 87 (Daniel D. Bradlow & Alfred Escher eds., 1999).

these tend towards investor protection alone, or towards a balance between protection and regulation; should they be binding or voluntary; should investors be offered privileged treatment based on international minimum standards, or only the same treatment as national investors? It has been argued that these debates have been overcome by events, in that the contemporary environment is more suited to the successful creation of a new multilateral regime for investor protection, as a result of shifts towards liberalisation, privatisation, and the recognition of the utility of inward direct investment by transnational corporations as a source of capital and technology.[23] The MAI is undoubtedly a product of this conviction.[24] According to the Report of the Committee on International Investment and Multinational Enterprises and the Committee on Capital Movements and Invisible Transactions:

> The MAI would build on the achievements of the present OECD instruments, consolidating and strengthening existing commitments under the Codes of Liberalisation and the 1976 Declaration and Decisions on International Investment and Multinational Enterprises. The aim of the negotiations is to conclude an agreement incorporating rollback, standstill, national treatment and non-discrimination/most favoured nation (MFN) as well as new disciplines to improve market access and to strengthen the basis of mutual confidence between enterprises and states. The liberalization obligations would be complemented by provisions on investment protection. The obligations under the agreement would need to be reinforced by effective dispute settlement procedures . . . . The agreement would be comprehensive in scope, covering all sectors under a broad definition of investment focusing mainly on [foreign direct investment]. The MAI would aim to raise the level of existing liberalization based on a "top-down" approach under which the only exceptions permitted are those listed when adhering to the agreement and which are subject to progressive liberalization.[25]

Thus, the draft MAI was based on earlier models of binding investor protection standards, leading it to be crafted as an investor and investment protection and promotion agreement, similar in type to the first category of agreements and instruments mentioned above. This was notwithstanding the proposed inclusion of the OECD Guidelines on Multinational Enterprises in a nonbinding Annex, coupled with a "no lowering of standards" clause, in relation to labour and environmental issues. While these provisions would offer some indication of the types of obligations MNEs had towards the states in which they operated, and of the need for host states not to compete for inward FDI on the basis of lowering regulatory standards in the above-mentioned areas, the essential leaning of the MAI towards investor rights and protection could not be disputed. It would prove to be a major cause of the failure of the negotiations.

At the outset, significant obstacles to the successful conclusion of such an instrument were identified.[26] Of the many obstacles encountered in the negotiating process, the following are worthy of highlighting: the negotiating environment, the contents of the draft MAI, and other "deal breakers" that were added to the negotiations as they progressed.

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23. *See* Thomas W. Walde, *Requiem for the New International Economic Order: The Rise and Fall of Paradigms in International Economic Law*, *in* INTERNATIONAL LEGAL ISSUES ARISING UNDER THE UNITED NATIONS DECADE OF INTERNATIONAL LAW 1301 (Najeeb Al-Nauimi & Richard Meese eds., 1995).

24. *See* William H. Witherill, *Towards an International Set of Rules for Investment*, *in* TOWARDS MULTILATERAL INVESTMENT RULES 9 and 17–30 (1996).

25. *Id.* at 10–11.

26. *See* Guy de Jonquieres, *Rocky Road to Liberalisation*, FIN. TIMES (London), Apr. 10, 1995, at 17.

A. The Negotiating Environment

The origins of the OECD negotiations can be traced back to U.S. initiatives in 1991 that called for the OECD to engage in the discussion of a wider investment instrument. This was supported by the Business and Industry Advisory Committee to the OECD in 1992. The United States wanted the OECD to adopt a "state-of-the-art" investment agreement with high standards of liberalisation, investor protection, and dispute settlement procedures.[27] Equally, calls for the institution of negotiations for a multilateral agreement on investment came from the European Commission, which argued for the establishment of a "level playing field" for direct investment in 1995.[28] The then-EU Trade Commissioner, Sir Leon Brittan, also gave weight to such a programme. He favoured a binding code that would be negotiated in, and subsequently administered by, the WTO.[29] The attraction to the WTO was threefold: first, it covered a large number of states, including developing countries; secondly, it possessed a binding dispute settlement procedure that could give the proposed code real legal force; and, thirdly, the EU had direct negotiating rights before the WTO on behalf of its members. Notwithstanding EU preferences for the WTO, and the discussion among OECD ministers in 1996 of a possible link between the OECD negotiations and the WTO at some unspecified future time, the MAI negotiations remained centered on the OECD. This may be explained by the fact that there would have been only limited backing for similar negotiations in the WTO. Indeed, when the issue was mooted at the 1996 WTO Singapore Ministerial Meeting, it was opposed by a group of developing countries led by Egypt, India, Malaysia, and Uganda.[30]

To counter the inevitable criticism that the OECD-based negotiations were unrepresentative, the MAI was envisaged as a freestanding international treaty open to all OECD Members, the European Communities, and to accession by non-OECD Member countries.[31] Members would have to persuade developing countries to accept the new disciplines and to sign on to the MAI. Thus, from the outset, the negotiating environment lacked a comprehensive and representative body of states. This was somewhat strange, given that a significant reason for adopting an MAI was to improve market access and investor protection in developing countries, the very group that was not represented by the OECD membership.

Finally, a major criticism of the negotiating environment came from civil society. As the negotiations went ahead from the latter part of 1995, a significant number of nongovernmental organizations (NGO) began to take an interest. This interest was spurred by the Internet publication of the Consolidated Negotiating Text of the MAI in August 1997. The text was a restricted internal document that had been leaked.[32] That, coupled with the relative lack of publicity concerning the negotiations in the media, gave rise to a feeling

27. *See* Elisabeth Smythe, *Your Place or Mine? States, International Organizations and the Negotiation of Investment Rules*, 7 Transnat'l Corp. 85, 101–02 (1998).

28. A Level Playing Field for Direct Investment World-Wide, COM(95)42 final at 1, *available in* LEXIS European Communities Law Library File.

29. *See* Guy de Jonquieres, *Brittan Wants WTO Rules for Investment*, Fin. Times (London), Jan. 19, 1995, at 4; Sir Leon Brittan, *Investment Liberalisation: The Next Great Boost to the World Economy*, 4 Transnat'l Corp. 1 (1995).

30. *See* David Henderson, The MAI Affair: A Story and Its Lessons 16 (1999); Smythe, *supra* note 27.

31. *See* Witherill, *supra* note 24, at 11.

32. *See* Henderson, *supra* note 30, at 22–23.

that the public and interested NGOs were being excluded from the process,[33] notwithstanding the fact that the process had been publicly announced in 1995.[34] The initial lack of attention to public opinion, and to the views of civil society, created an air of hostility to the project that made it hard to justify on a political level.

B. The Content of the MAI

The draft MAI consisted of twelve major sections: the general provisions and preamble; scope and application; treatment of investors and investments; investment protection; dispute settlement; exceptions and safeguards; financial services; taxation; country-specific exceptions; relationship with other international agreements; implementation and operation; and final provisions.[35] It is not possible to give a detailed analysis of all the outstanding negotiating questions in this paper. Instead, the emphasis will be on the key controversies that remained unresolved during the negotiations, and that may be said to have contributed to their failure. These are the scope of the definition of "investor" and "investment"; the extension of investor protection to the pre-entry stage and exceptions to this; the nature and content of the nondiscrimination standard that lay at the heart of the draft MAI and was expressed through the national treatment and most-favoured-nation (MFN) standards; the scope of the prohibition on performance requirements; the applicable rules on expropriation; and the proposed dispute settlement provisions that would have given MNEs direct rights to bring claims against signatory states.

1. *The Definition of "Investor" and "Investment"*

It is usual for an IIA to begin with a scope and definition clause. The geographical coverage, temporal application, and subject matter of the agreement must be ascertained. In particular, the last issue revolves around the definition of the terms "investor" and "investment." These terms give the IIA its normative content. Indeed, the definition of these terms raises serious policy issues, and they will be the subject of hard bargaining as they determine the extent and the manner in which the other provisions are to be applied.[36] In this regard, the draft MAI was no different. However, the proposed formulation of the above terms was extremely wide. Thus, "investor" included not only nationals but also permanent residents, as well as legal persons or other entities constituted or organised under the applicable law of a Contracting Party. "Investment" was defined in terms of "every kind

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33. *See* Noam Chomsky, Profit over People: Neoliberalism and Global Order 131–55 (1999).

34. *See* Henderson, *supra* note 30, at 18.

35. The MAI Negotiating Text (1998) DAFFE/MAI/NM (98) rev. 1, *available at* http://www.oecd.org/daf/investment/fdi/mai/maitext.pdf [hereinafter MAI Consolidated Text]; Commentary to the MAI Negotiating Text (1998), *available at* http://www.oecd.org/daf/investment/fdi/mai/maicome.pdf [hereinafter MAI Negotiating Text]. For analysis of the principal provisions, see *Lessons from the MAI, 1999*, UNCTAD Series on Issues in International Investment Agreements, U.N. Doc. TD/UNCTAD/ITE/IIT/ MISC.22 [hereinafter *Lessons*]; Steven J. Canner, *The Multilateral Agreement on Investment*, 31 Cornell Int'l L.J. 657 (1998); Frans Engering, *The Multilateral Investment Agreement*, 5 Transnat'l Corp. 147 (1996); Arghyrious Fatouros, *Towards an International Agreement on Foreign Direct Investment?*, 10 ICSID—Rev. Foreign Inv. L.J. 181 (1995); Sol Picciotto, *A Critical Assessment of the MAI*, *in* Regulating International Business, *supra* note 6, at 82; Sol Picciotto, *Linkages in International Investment Regulation: The Antinomies of the Draft Multilateral Agreement on Investment*, 19 U. Pa. J. Int'l Econ. L. 731 (1998).

36. *See Scope and Definition*, UNCTAD Series on Issues in International Investment Agreements, at 6, U.N. Doc. TD/UNCTAD/ITE/IIT/11/Vol. II (1999).

of asset owned or controlled, directly or indirectly, by an investor . . ." followed by an illustrative, though not exclusive, list that covered both equity-based and contractual assets. These included, inter alia, construction contracts, loans, claims to money or performance, intellectual property rights, concessions, licences, and property-related contractual rights such as leases or mortgages.[37]

Although there was broad support for an asset-based definition, certain delegations argued for the exclusion of portfolio investment, and others found it difficult to accept an open definition.[38] There was also concern over the extent of coverage given to investments indirectly owned or controlled by investors of a party. Indirect ownership of investments located outside an MAI country by investors from an MAI country would be covered, as would investments located in an MAI country owned and controlled by an investor located in a non-MAI country. This approach would permit MNEs to manage their capital flows in a flexible manner utilising their transnational network of affiliates as they saw fit. On the other hand, some delegations favoured a denial of benefits clause, which would exclude investors who lacked a substantial business presence in an MAI country from the protection of the Agreement.[39] Many issues remained unresolved, and the text refers to further work being needed in the areas of indirect investment, intellectual property, concessions, public debt, and real estate.

2. *Extension to Pre-entry Protection*

The draft MAI would require the progressive liberalisation of rights of entry and establishment. This was in line with the policy of the OECD Codes on Liberalisation and followed the precedent set by NAFTA and in BITs negotiated by the United States, and more recently, Canada.[40] Historically, states have reacted differently to such proposals. While advocating greater liberalisation for outward investment, many states may prefer to restrict the flow of inward investment for protectionist purposes. Economic unions, such as the EU, may want the right to liberalise faster for internal investors than for investors from outside the economic union.[41] Federal states may encounter internal political objections from federal subdivisions to the effect that an MAI could curtail their local competence and discretion in formulating inward investment policy.[42] A similar problem could confront local authority initiatives.[43] Developing countries in particular may prefer to exercise caution in relation to inward investment and thus to retain screening powers on entry so as to

37. MAI Consolidated Text, *supra* note 35, at 11.

38. *See Lessons, supra* note 35, at 11.

39. MAI Negotiating Text, *supra* note 35, at 6–7.

40. *See Admission and Establishment, supra* note 9, at 23–28. Other regional investment agreements have followed this approach albeit with variations such as transitional periods. *See* MERCOSUR Decision 11/93, *in* COMPENDIUM, *supra* note 16, vol. II at 513; ASEAN Framework Agreement on the ASEAN Investment Area, 1998, *in id.* vol. IV at 227. For side agreements, see Energy Charter Treaty, arts. 10(2)-(4), *in* COMPENDIUM, *supra* note 16, vol. II at 555.

41. *See infra* notes 76–78.

42. Such concerns led one delegation to propose an additional clause ensuring that where a sub-federal entity offers more favourable treatment to its investors and investments, as compared to that offered by other sub-federal entities, the more favourable treatment should be extended to foreign investors and investments under the national treatment standard. *See* MAI Consolidated Text, *supra* note 35, at 129.

43. *See* Robert Nurick, *The MAI: Potential Impacts on Local Economic Development and Poverty Issues in the UK*, OXFAM, Mar. 1998; World Development Movement, *The Impact of the Multilateral Agreement on Investment on Local Government in the UK* (1998).

protect indigenous infant industries from excessive competition on the part of powerful MNEs. Indeed, most BITs, with the exception of the above-mentioned U.S. and Canadian models, follow an investment control approach, based on the right of the receiving state to regulate the entry of foreign investors in accordance with national laws and regulations, and do not contain entry and establishment rights.[44]

Clearly, rights of entry and establishment would not be accepted without significant exceptions. Many restrictions on the rights of foreign investors may be regarded as entirely legitimate; the most obvious examples being restrictions based on public health, order, morals, or strategic and defence grounds. Indeed, the draft MAI contained provisions embodying such general exceptions. In addition, it gave contracting states the right to enter country-specific exceptions.[45] Numerous country-specific exceptions were put forward by states, resulting in what some have called a "Swiss cheese" agreement, with more "holes" than the negotiators originally expected. This has been explained on the ground that many exceptions taken by states were mere bargaining counters, to be discarded on the gaining of concessions.[46] However, the large number of exceptions may reflect the "top-down" approach taken in the MAI.

The extension of rights of entry and establishment can be achieved in an IIA in one of two basic ways: by stating the right and allowing exceptions thereto—the "top-down" approach favoured in the MAI draft; or by giving states the discretion to open up specific sectors as and when they feel ready to do so—the "bottom-up" approach. This is the approach taken in GATS, where contracting states are not bound to offer entry and establishment rights to investors from other contracting states.[47] Rather, by articles XVI and XVII of that agreement, they are given the discretion to specify which sectors will be subject to market access rights, and the extent to which full national treatment will apply. This approach may be more attractive to states that are hesitant to enter into broad commitments regarding entry and establishment. The "top-down" approach of the MAI, by contrast, places liberalisation of entry conditions at the heart of the agreement. The only sure course of action for a state concerned not to give too much away may be to lodge extensive general and country-specific exceptions so as to preserve existing national regulations, and hence host country discretion, over entry and establishment. The result is often an unwieldy agreement in which the exceptions serve to complicate its scope and interpretation. NAFTA is a case in point.[48] Furthermore, once country-specific exceptions have been made, in the absence of a transitional period within which such exceptions must be removed, the effect of the agreement may be to entrench them, thereby defeating the aim of progressive liberalisation. Even if a transitional period exists, it is quite likely that, in practice, it will be extended where the contracting states do not feel ready to espouse full liberalisation. Indeed, this issue continued to be a matter of discussion with no final agreement being reached on how the MAI would achieve its avowed aim of "rollback" on nonconforming, country-specific measures.[49] The sheer number and range of exceptions submitted by delegates to

44. *See Admission and Establishment*, *supra* note 9, at 18.

45. *See* MAI Consolidated Text, *supra* note 35, at 77–80 and 90.

46. *See Lessons*, *supra* note 35, at 12.

47. General Agreement on Trade in Services, Dec. 5, 1993, 33 I.L.M. 44.

48. *See* Michael Gestrin & Alan Rugman, *The North American Free Trade Agreement and Foreign Direct Investment*, 3 TRANSNAT'L CORP. 77 (1994); *The NAFTA Investment Provisions: Prototype for Multilateral Investment Rules*, *in* OECD MARKET ACCESS AFTER THE URUGUAY ROUND 63 (1996).

49. *See* MAI Consolidated Text, *supra* note 35, at 60.

the MAI made it essential to develop a response that would guide the participants on how to handle this matter. Unfortunately, there is little evidence that this was attempted, and it may be one of the key reasons why the MAI failed.

3. *Nondiscrimination*

The nondiscrimination provision in the draft MAI concerned both national treatment and MFN treatment. This portion respectively would have ensured treatment for foreign investors "no less favourable" than that received by national investors or investors, from other countries, whichever was the more favourable to the investor. The most controversial issue was the extension of the nondiscrimination standard to rights of entry and establishment. As noted above, this raised the issue of exceptions. Other problems that were not resolved concerned the scope of the nondiscrimination standard itself. At the outset, it is worth noting that these two aspects of nondiscrimination were discussed as a combined standard. This may have led to an overemphasis on national treatment issues, which are inherently more sensitive than issues relating to the MFN standard. In particular, as noted by a recent UNCTAD study on MFN treatment:

> Exceptions to national treatment are more frequent than exceptions to MFN. This reflects the fact that countries find it more difficult to treat foreign and domestic investors equally than to provide for equal treatment among investors from different home countries. Furthermore, there may be special situations in which a privileged treatment of domestic enterprises can be justified.[50]

It may have been better to discuss each standard in a separate provision, so as to ensure that MFN status would not be overwhelmed by national treatment issues. Indeed this is the approach of the GATS, where MFN status is a general obligation under Article II, while national treatment is an optional obligation under Article XVII.

As regards the content of the nondiscrimination standard, two closely related questions had to be answered: first, what were the factual situations in which the standard applied, and secondly, what technique of comparison should be adopted in order to determine when foreign investors or their investments were being discriminated against. As to the first issue, the draft MAI referred to "establishment, acquisition, expansion, maintenance, use, enjoyment and sale or other disposition of investments."[51] This formulation was considered by several delegations to be a comprehensive one whose terms were designed to cover all activities of investors and their investments for both the pre- and post-establishment phases. Other delegations favoured a closed list of investment activities covered by the nondiscrimination standard. Others objected to this approach on the grounds that, while such a list has the advantage of certainty, it could omit elements that were of importance to the investor.[52] A related issue concerned whether or not to include a qualifying phrase "in like circumstances." No agreement was reached on its inclusion. Some delegations thought that national treatment and MFN status implicitly provided the comparative context for determining whether a measure unduly treated foreign investors and their investments differently, and that the inclusion of the words was unnecessary and open to abuse. Other dele-

50. *Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements, at 31, U.N. Doc. TD/UNCTAD/ITE/IIT/10/Vol. II (1999).

51. MAI Consolidated Text, *supra* note 35, at 13.

52. *See* MAI Negotiating Text, *supra* note 35, at 11.

gations thought the comparative context should be indicated, following the practice of the OECD National Treatment Instrument, some BITs, and NAFTA.[53] As to the second question, the formulation adopted in the MAI Negotiating Text included the phrase "treatment no less favourable."[54] This opens the possibility for treatment that may be in practice more favourable for foreign, as compared to national, investors and investments, as where, for example, the treatment of national investors falls below international minimum standards.[55] In this light there was discussion as to whether the "same" or "comparable" treatment approach should be used. However, the majority of delegates considered that this would unacceptably weaken the standard of treatment from the investor's viewpoint.[56]

4. *Performance Requirements*

The MAI would have made the imposition of performance requirements as a condition of entry and establishment subject to extensive prohibitions.[57] In particular, it would have prohibited the following: trade-related requirements dealing with the ratio of export sales to total sales, domestic content and local purchasing rules, and the ratio of local sales to exports; transfer of technology requirements, except where imposed under competition laws; location of headquarters requirements; requirements to supply goods or services to a specific region or the world market exclusively from the host country; local research and development targets; mandatory employment of nationals; establishment of a joint venture with domestic participation; and minimum and maximum levels of foreign equity participation. Trade-related performance requirements would have been absolutely prohibited, while the other categories could be allowed where they were linked to advantages granted in connection with an investment in the territory of the host contracting party.

All of these policies entail a discretion in economic planning that might be used to favour national investors. Indeed, performance requirements can be justified as a means of ensuring fair competition between MNEs and local firms in the domestic market, and may be used to stimulate exports from developing countries by MNEs.[58] This was one of the issues picked up by NGOs who feared that the MAI could weaken such regulatory discretions to the disadvantage of the host state. On the other hand, controls over performance requirements can be justified on the basis that such measures do little but introduce burdens on investors that would not have been undertaken in the absence of compulsion. They are said to represent a second-best policy of market intervention that increases investment costs and may deter investors from the country in question, or force them to operate their investment at less than full efficiency.[59] This theoretical debate has never been fully resolved, leading to concern over attempts to control state discretions in this area. Indeed, delegations treated the matter with caution given the absolute nature of the obligations and the complexity of the matters at issue.[60] The controversial nature of these matters is further emphasized by

53. *Id.*

54. MAI Consolidated Text, *supra* note 35, at 13.

55. *See National Treatment*, UNCTAD Series on Issues in International Investment Agreements, at 37, U.N. Doc. TD/UNCTAD/ITE/IIT/11/Vol. IV (1999).

56. *See* MAI Negotiating Text, *supra* note 35, at 10.

57. MAI Consolidated Text, *supra* note 35, at 18–26.

58. *See* Theodore H. Moran, *The Impact of TRIMs on Trade and Development*, 1 TRANSNAT'L CORP. 55 (1992); Picciotto, *supra* note 35, at 751.

59. *See* Moran, *supra* note 58.

60. *See Lessons*, *supra* note 35, at 16.

the fact that the related issue of incentives was postponed for discussion after the adoption of the MAI. Had this been included on the agenda, the very right of a subnational authority, with constitutional powers over investment matters to offer incentives, would have been put into question.[61] This would have been politically impossible to justify especially in countries with powerful subnational entities such as the United States and Canada. Furthermore, the exclusion of controls on incentives, coupled with the inclusion of controls on performance requirements, would have unbalanced the MAI in relation to developing countries. These countries have tended to use performance requirements in their economic policy making, while developed countries have tended to prefer incentives. Both types of distorting measures should have been placed under MAI disciplines if the aim was to exclude *all* measures capable of distorting economic efficiency. As it was, the MAI, like the WTO TRIM Agreement before it, would have acted more vigorously against the practices of developing countries in this area.

5. *Provisions on Expropriation*

The MAI provision on expropriation sought to include the international minimum standards that had become commonplace in BITs. However, its scope was controversial in that it covered not only direct but indirect takings.[62] This approach could cause significant problems for countries with strong regulatory regimes as any act of regulation that limits the capacity of an investment to make profits could be seen as an indirect taking of property. This caused much discussion leading to the proposal that an interpretative note be added to the text explaining that the expropriation provision does not "establish a new requirement that Parties pay compensation, for losses which an investor or investment might incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments."[63]

On the other hand, the provisions on taxation make clear that the provisions on expropriation will apply to taxation measures that amount to outright or "creeping" expropriation, but not if the measure is "generally within the bounds of internationally recognised tax policies and practices."[64]

6. *Dispute Settlement Provisions*

These were among the most controversial aspects of the MAI. The draft contained a chapter on dispute settlement covering both state-to-state and investor–state disputes.[65] The latter in particular gave rise to difficulties. It would have granted to foreign investors special rights to challenge national decisions concerning the observance of the substantive provisions of the MAI. In particular, failing to settle the dispute by negotiation or consultation, the investor would be free to choose to submit it for resolution to any competent courts or

61. *See id.* at 17.

62. According to the MAI Consolidated Text, "A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect . . . except . . . for a purpose which is in the public interest . . . on a non-discriminatory basis . . . in accordance with due process of law . . . accompanied by payment of prompt, adequate and effective compensation. . . . " MAI Consolidated Text, *supra* note 35, at 57.

63. *Id.* at 144. Significantly, this formulation is to be found in the Annex containing the package of proposals for text on environment and labour.

64. *Id.* at 87.

65. *Id.* at 63–76.

administrative authorities of the Contracting Party to the dispute. Resolution would be in accordance with any dispute settlement procedure agreed upon prior to the dispute arising or by arbitration, in accordance with the procedural provisions of this MAI article, under ICSID, the ICSID Additional Facility, the Arbitration Rules of UNCITRAL, or the ICC Rules of Arbitration.

This approach to dispute settlement is not new. It has become a standard feature in IIAs. For example, most BITs contain an investor-state dispute settlement provision that encourages amicable settlement, with third party settlement, such as arbitration before an international arbitral body, as a last resort. Similar provisions can be found in NAFTA, MERCOSUR, and the Energy Charter Treaty.[66] However, the NGOs saw this provision —and similar formulations in other IIAs—as giving foreign investors special privileges that enabled them to neutralise legitimate national laws and regulations by claiming before an international tribunal that they violated the protective standards of the IIA.

Much was made of the recent case brought by the Ethyl Corporation against Canada under the dispute settlement provisions of NAFTA. Ethyl claimed that a Canadian law banning the importation of the gasoline additive MMT into Canada violated its rights as an investor under that agreement. This case eventually settled in July 1998 with Canada lifting the import ban and paying $13 million to Ethyl.[67] The NGOs saw this case as an example of how the provisions of NAFTA could be used to invalidate a measure based on environmental concerns.[68] Similar objections were made by one delegation, while others voiced opposition to the extension of the dispute settlement procedure to the pre-establishment phase.[69] Numerous unresolved questions remained after the negotiations had finished, including the question of the role of local remedies, the scope of reservations, and of the principle of unconditional prior consent to the MAI system.[70] A number of delegations were left feeling that much work was still needed on dispute settlement.

C. Other "Deal Breakers"

The preceding discussion has centered on the main areas of disagreement within topics that could be regarded as part of the conventional content of IIAs. In this section, a number of further issues are considered. They all share the common features of going beyond the conventional content and of being highly controversial, but yet incapable of being excluded from the agenda due to the insistence of one or more delegations that had a special interest in the matter. By contrast, other issues that could have raised serious controversies, namely taxation, intellectual property, and incentives, were either left out after initial debates or reserved for future discussion.[71] Negotiations had also taken place concerning the extension

66. *See Lessons, supra* note 35, at 19. On investor state dispute settlement generally, see Muchlinski, *supra* note 10, ch. 15.

67. The case is reported in relation to the jurisdictional issues under NAFTA. *See* NAFTA Chapter II Arbitral Tribunal: Ethyl Corporation v. Canada (Decision Regarding the Place of Arbitration), Nov. 28, 1997, 38 I.L.M. 700.

68. Another recent case that has received similar attention concerns the U.S. Metalclad Corporation's claim under NAFTA against Mexico. *See* Matthew Nolan & Darin Lippoldt, *Obscure NAFTA Clause Empowers Private Parties*, Nat'l L.J., Apr. 1998, at B8.

69. *See Lessons, supra* note 35, at 19.

70. *See* MAI consolidated Text, *supra* note 35, at 38–39.

71. Taxation was carved out of the MAI, except in relation to expropriation and transparency commitments, so as to avoid clashes with double taxation agreements; intellectual property discussions were left at the stage

of nondiscrimination to privatisations[72] and to monopolies/state enterprises/concessions.[73] While financial services were included in view of their special regulatory demands, this necessitated the clarification of the scope of state discretion in this area so that it could be exercised in conformity with the treatment provisions of the MAI.[74] In none of these fields was there final agreement at the time negotiations were suspended.

Four such "deal-breakers" were introduced into the agenda: in the light of the controversy over the Helms-Burton Act, the issues of the extraterritorial application of investment-related national laws and of the establishment of international disciplines to deal with the use of confiscated foreign-owned property; the regional economic integration organisation (REIO) exception to the nondiscrimination standard; the "cultural industries" exception; and labour and environmental standards.

1. *New Disciplines on the Treatment of Illegally Confiscated Property*

In the course of MAI negotiations, the United States tried to introduce new disciplines concerning the rights of owners of illegally expropriated property to pursue claims against its current owners. This emerged out of the controversy generated by the Helms-Burton Act[75] that sought to recover claims concerning property owned in Cuba by U.S. nationals, taken at the time of the Cuban revolution, and which was now owned by firms from other countries, mainly Europe, Canada, and Mexico. In May 1998, an understanding was reached on these issues between the U.S. and EU leaders, though with significant restrictions as to its scope. In the end, two alternative, country-specific proposals for new drafts existed, one on conflicting requirements and one on secondary investment boycotts. The first would prevent a Contracting Party from prohibiting outside its territory an investor from another Contracting Party from acting in accordance with that other Contracting Party's laws, regulations, or express policies, unless these were contrary to international law. The second would prohibit the Contracting Parties from taking measures that impose liability on investors or investments of investors from another Contracting Party, or prohibit or impose sanctions for dealing with investors of another Contracting Party because of investments an investor of another Contracting Party makes, owns, or controls, directly or indirectly, in a third country in accordance with the regulations of such third country.[76]

2. *The REIO Exception*

The nondiscrimination provision of the MAI had the potential to create a "free rider" problem. By relying on that provision, MAI contracting states could enjoy the benefits of a REIO, whose membership consisted of parties to the MAI, without being members of that organization. To deal with this problem, the EU proposed that a REIO exception be included in the MAI.[77] There remained considerable disagreement as to the scope of such

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that a separate provision excluding the application of the nondiscrimination standard beyond the scope of existing commitments in intellectual property conventions would be inserted into the MAI, and incentives would have been discussed after the adoption of the MAI. *See* MAI Consolidated Text, *supra* note 35, at 46–48, 50–52, and 87–89.

72. *See id.* at 27–31.

73. *See id.* at 32–45.

74. *See id.* at 81–86.

75. *See* Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104–114, 110 Stat. 785 (1996); Iran and Libya Sanctions Act of 1996, Pub. L. No. 104–172, 110 Stat. 1541 (1996).

76. *See* MAI Consolidated Text, *supra* note 35, at 122–27.

77. *See id.* at 118–19; *see also* Joachim Karl, *Multilateral Investment Agreements and Regional Economic Integration*, 5 TRANSNAT'L CORP. 19 (1996).

a clause at the time negotiations were suspended. Some delegations thought that this proposal struck at the very objectives of the MAI, which included the gaining of market access to REIOs on a par with access by investors from the member countries of such organizations. On the other hand, as the EU had argued, membership in such organizations carried with it additional obligations that nonmembers did not carry, such as, for example, the acceptance of majority voting, and extension to areas not covered by the MAI, such as the recognition of diplomas. To extend the benefits of membership to nonmembers in such circumstances would be very difficult.[78]

3. *The Cultural Industries Exception*

This exception would preserve the right of a Contracting Party to take any measure to regulate investment of foreign companies and the conditions of activity of those companies in the framework of policies designed to preserve and promote cultural and linguistic diversity.[79] This exception was championed by France and Canada in particular, who feared an "Americanisation" of global media industries. It was strongly opposed by U.S. media interests. The issues remained unresolved at the time the MAI negotiations were suspended.

4. *Labour and Environmental Standards*

Initially, the MAI was not to have included labour and environmental standards. However, in response to extensive lobbying by NGOs and trade unions,[80] some general provisions were included in the preamble and an additional labour and environment clause was proposed by the Chairman of the Negotiating Conference in Annex 2 to the Draft Agreement.[81] The clause concentrated on the need for a balanced relationship between the MAI disciplines and other areas of public policy, and on the avoidance of unintended consequences of normal regulatory practices. In particular, it was noted that the inclusion of the "in like circumstances" formulation in the nondiscrimination provision would address the problem of de facto discrimination where a measure, not specifically aimed at foreign investors or investments, would have the practical effect of treating them less favourably compared to domestic and/or other foreign investors or investments. The principal aim was to ensure that the MAI did not inhibit normal, nondiscriminatory governmental regulatory activity in these areas. Another aspect of this issue was the proposed inclusion of a "no lowering of standards" clause, which would have ensured that countries could not use a lowering of labour, environment, or health standards as incentives for inward investment.[82] However, the precise content of that clause was never agreed upon and it remained subject to many drafting alternatives.

III. Analysis: Lessons for the Future

The problems described above proved fatal to the conclusion of the MAI. On October 14, 1998, French Prime Minister Lionel Jospin stated that France would take no further part in the negotiations on the ground that the MAI, as currently formulated, represented

78. *See Lessons, supra* note 35, at 14–15.

79. *See* MAI Consolidated Text, *supra* note 35, at 128.

80. *See also* HENDERSON, *supra* note 30, at 22 and 27–28; Nick Mabey, *Defending the Legacy of Rio: The Civil Society Campaign Against the MAI, in* REGULATING INTERNATIONAL BUSINESS, *supra* note 6, at 60.

81. MAI Consolidated Text, *supra* note 35, at 140–45.

82. *See id.* at 54.

an unacceptable threat to national sovereignty.[83] A week later, on October 22, the senior representatives of the OECD Members and the European Commission convened in the Executive Committee of the Special Session of the OECD in Paris. They announced that they would now proceed with further consultations on the controversies that the negotiating process had raised, thereby effectively ending the negotiations on the MAI.[84]

There is much debate on the actual causes of this failure. The political opposition to the Agreement generated by the NGO community undoubtedly made a significant contribution by raising awareness of its one-sided nature, and by offering an organised critique based on the unaccountability of MNEs and of the multilateral economic organisations that were trying to introduce the MAI. This view of events continues to make the adoption of future multilateral rules in this area politically difficult. However, the principal reason lies in the conception of the agreement as a pure investor and investment protection instrument. This made the agreement an anachronism from the start. The MAI was based on fundamental misconceptions as to the nature of transnational economic interactions in an era of increased privatisation and deregulation at the national level. Thus, the MAI started from the false premise that governmental power to control business had to be curtailed. It lived in a world dominated by old political agendas signified by the "right/left" axis of Cold War politics, in which the principal concerns of foreign direct investors were to preserve existing investments in recently decolonised and/or increasingly politically assertive host countries.

The new political environment no longer places "right/left" issues of ownership and control at centre stage. Rather, there has been a transformation in political discourse, which challenges not the legitimacy and value of free private enterprise as such, but its legitimacy as a polluter, an abuser of market power, a corruptor of state officials, an exploiter of workers, and a potential accomplice to violations of fundamental human rights. Thus, the correct starting point should have been an acknowledgement that, in this new investment

83. *See France Quits Investment Accord Talks on Multilateral Agreement, Jospin Says Structure 'Not Open to Reform' and Sovereignty Threatened*, FIN. TIMES, Oct. 15, 1998, at 5; *see also* HENDERSON, *supra* note 30, at 30–31. For the full debate, see Assemblée Nationale, Session Ordinaire de 1998–1999 (daily ed. Oct. 13, 1998), *available at* http://www.assemblee-nationale.fr/2/cra/2aa.htm. The Prime Minister's official statement followed the recommendations of a Special Commission appointed in May 1998 to examine the MAI under the chair of Catherine Lalumiere, MEP, and Jean-Pierre Landau, Inspector General of Finances. This body concluded that, while France should continue to press for new negotiations, this should only be done on the fulfillment of at least seven major conditions:

- the definition of FDI exclude portfolio investment and financial market operations;
- the dispute settlement provisions be confined to interstate disputes;
- the words "full and constant protection and security" under the heading "General Treatment of Investments be deleted;"
- the words "measures having equivalent effect" in the draft expropriation clause be deleted;
- the restrictions on performance requirements be limited to an extension of the TRIMs provisions to services;
- the right to bring back reservations be subject to compensation for other Contracting Parties as in the WTO; and
- final agreement be conditional on the accession of a sufficient number of non-OECD countries.

84. *See* Press Release, Chairman's Statement Under Secretary of State Stuart Eizenstat (USA) Executive Committee in Special Session (Oct. 23, 1998), *available at* http://www.oecd.org/media/release/nw98-101a.htm. The negotiations were formally ended in a further informal OECD Meeting in December 1998. *See* HENDERSON, *supra* note 30, at 32.

environment, new regulatory issues, of the kinds listed above, emerge.[85] It was the complete failure to address these new questions that undermined the MAI, based as it was on models of IIAs that were, in effect, a response to increased state intervention and control over the national economy through nationalisations and highly interventionist national economic plans. In the light of the foregoing, a number of conclusions can be drawn.

First, as to the negotiating process, any future multilateral initiative must be made more representative in terms of the participating countries. The active involvement of developing countries and countries in transition is essential. Their exclusion through the choice of the OECD as the negotiating forum was based on a suspicion as to their motives for being skeptical about new multilateral investment disciplines, a feeling that seemed to have been based on historical patterns of behaviour now largely abandoned by these countries in their search for inward FDI. It is perhaps ironic that a major reason for the failure of the negotiations was the fact that many of the OECD member countries had themselves not achieved a fully liberalised environment for inward FDI, as exemplified by the extensive reservations to the Code on the Liberalisation of Capital Movements[86] and the many country-specific exceptions to the MAI. These reservations and exceptions made OECD members unable to agree to the text.

The developing countries must come fully armed to the negotiating table. The UNCTAD programme on issues in IIAs seeks to achieve this purpose. It involves regional seminars for developing country officials, the publication of specialised issues papers as guides to negotiators, and ongoing analysis of the development implications of IIAs, focused on the concept of "flexibility for development."[87] Furthermore, to counter the perceived lack of civic input into the original negotiations, provision should be made for representatives of civil society to be officially involved in the negotiations as advisers and not merely as observers. However, the ultimate responsibility for concluding binding rules must rest with governments as the only legitimate and accountable representatives of their populations.[88]

As to venue, the WTO continues to be mentioned as a possibility, given its wide membership. However, some groups have expressed caution given its commitment to free trade. They would welcome a more pluralistic venue, possibly within the United Nations. Another alternative might be to establish a specialist negotiating forum, composed of inputs from the WTO, UNCTAD, and other relevant intergovernmental organisations.

As to content, the draft MAI was criticised as displaying an imbalance between investor rights and responsibilities. This prompted NGOs, unions, consumer groups, and others to campaign for the introduction of tougher responsibilities for investors. This may entail a binding section on investor responsibilities, which, while covering many of the same issues, would go beyond the mere appending of the OECD Guidelines on Multinational Enterprises in a nonbinding Annex. Numerous NGO proposals for a code based on such an approach have been formulated and may be a useful guide to negotiators.[89]

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85. On which, see further the interesting paper by Arghyrios A. Fatouros, *International Investment Agreements and Development—Problems and Prospects at the Turn of the Century*, *in* LIBER AMICORUM PROFESSOR SEIDL-HOHENVELDERN—IN HONOUR OF HIS 80TH BIRTHDAY 115 (Gerhard Hafner et al. eds., 1998).

86. *See supra* note 13, Annex B (both Codes).

87. *See UNCTAD'S Work Programme on International Investment Agreements: From UNCTAD IX, Midrand (1996), to UNCTAD X, Bangkok (2000)* (United Nations Conference on Trade and Development, United Nations 2000); *see UNCTAD Flexibility: UNCTAD Series on Issues in International Investment Agreements* (forthcoming).

88. *See* HENDERSON, *supra* note 30, at 57–60.

89. *See, e.g.*, UNCTAD COMPENDIUM vol. V (forthcoming 2000); *Human Rights Guidelines for Companies* (Amnesty International—The Business Group, London, England), 1998.

Secondly, with further awareness of the need for "flexibility for development," the very structure, objectives, substantive rules and modes of implementation, and monitoring of future multilateral investment rules should ensure that there is a balance between the protection of investors and the interests of countries, especially developing countries. Such future rules must avoid falling into the pitfall of the MAI, which recognised only the "legal symmetry" of the contracting parties, thereby assuming that all countries were formally equal under the law of the Agreement. However, with the active participation of developing countries, such "legal symmetry" cannot co-exist with the reality of "economic asymmetry" without exposing developing countries to the risk of damaging competition from, often stronger, foreign investors, including MNEs. Thus, the very structure, content, and organisation of the agreement should aim at minimizing "economic asymmetry" through provisions that ensure respect for the legitimate development needs of countries. This may require the introduction of transitional provisions, commitments to cooperation, and technical assistance provisions.[90]

Thirdly, the failure of the MAI shows that even the developed countries cannot agree on a "fast-track" liberalisation agreement. The major lesson is that negotiation of a MAI-type agreement is not a zero-sum game, with either full liberalisation or full protectionism as the possible outcomes. Perhaps the inevitable result will be an agreement with some liberalisation and some protectionism, much like the current example of NAFTA. One way around this, as noted above, could be to abandon the MAI's commitment to liberalisation coupled with "top-down" lists of exceptions, and to adopt the more cautious approach of selective liberalisation whereby a country "opts-in" to liberalisation by specifying the sectors in which it is willing to accept such disciplines while leaving nonspecified sectors outside the agreement. Equally, clear rules must be agreed to concerning the treatment of country-specific exceptions, which balance the desire for liberalisation against the legitimate concerns of states to protect their sovereign discretion. For example, the WTO practice of allowing the restoration of reservations on payment of compensation to other contracting parties, as advocated by the French Lalumiere Report on the MAI,[91] might be considered.

Furthermore, recent developments in arbitral jurisprudence suggest that any future dispute settlement mechanism will have to operate within the limits of international law, which should act as a check against excessive claims made against host countries by investors. In particular, in the recent NAFTA case of *Azanian v. United Mexican States*,[92] the tribunal held that a claim against the termination of a contractual concession to supply solid refuse collection and disposal services to a local authority in Mexico could not amount to an expropriatory taking in violation of Chapter 11 of NAFTA where the Mexican authorities had not acted in violation of international law standards. Such a violation could not be surmised simply from the fact that the investor had suffered a breach of contract at the hands of the host state's authorities. Indeed, on the facts of the present case, the alleged breach had been reviewed by three levels of Mexican courts, and in none of these was the alleged breach made out. Thus, in the absence of proof that the Mexican courts had themselves acted in breach of Chapter 11, by violating the international legal standard of due process through a denial of justice or pretense of form, the claimant's case failed. It follows

90. For a detailed discussion and illustrative examples, see *UNCTAD Flexibility*, *supra* note 87.

91. *See* Lalumiere, *supra* note 83.

92. Azinian v. United Mexican States (U.S. v. Mex.), ICSID (W. Bank) Case No. ARB(AF)/97/2 (Nov. 1, 1999).

that only in the most serious cases of alleged violations of multilateral investment rules should an international dispute settlement body be used.

Moreover, in the recent WTO dispute settlement body decision concerning the white asbestos dispute between Canada and France, the WTO Panel upheld the right of the French authorities to ban the importation of white asbestos from Canada on the basis of the scientific assessment of the health risks involved on the part of the experts consulted by the Panel.[93] Though not too much should be read into this decision, this signals a move away from the type of problem perceived to have arisen in the Ethyl case. Any future dispute settlement mechanism will have to take account of the legitimate interests of the host state in regulating the activities of foreign investors. Such regulation does not in itself constitute an infringement of international investment protection rules. That was implicit in the discussions on this issue under the MAI. Now it would appear that arbitral tribunals have made explicit this qualification on the rights of investors.

Finally, linkages with other issues such as labour standards, human rights, environmental protection, competition, taxation, and intellectual property will have to be tackled to ensure that future multilateral investment rules do not interfere in a way that undermines existing international obligations of states in these areas.[94] In this regard, a new debate.has arisen among NGOs. On September 15, 1999, a new group of academics and NGOs from developing countries issued a "Statement Against Linkage."[95] This calls for the de-linking of environmental and labour questions from any future multilateral rules on investment, and their remaining within specialised bodies such as the ILO on the ground that these constitute no more than hidden protectionism by developed countries against developing countries that may have lower standards in these areas. This position has been vigorously opposed by, among others, the International Confederation of Free Trade Unions.[96] However, given the existence of a Trade and Environment Working Group in the WTO, and the growing concern over corporate responsibilities generated by Western NGOs, it is likely that this wider agenda will remain within that organisation.

In conclusion, certain wider implications of the lessons from the failure of the MAI should be highlighted. First, the lessons of the MAI go further than the WTO. Numerous bilateral investment agreements continue to be negotiated, as do new regional investment agreements, a notable recent example being the ASEAN Framework Agreement on an ASEAN Investment Area of 1998.[97] The scope and development of such IIAs need to reflect the experience gained under the MAI so as to create a new generation of agreement types that

93. *See* Scott Morrison & Frances Williams, *WTO Upholds White Asbestos Ban, Trade Ruling Panel Rejects Canadian Claim After Scientists Agree the Material Is Carcinogenic*, FIN. TIMES, June 15, 2000, at 14. For background, see Sam Zia-Zarifi, *The Vital Issues in the WTO Asbestos Dispute*, TUTB NEWSL. (European Trade Union Technical Bureau for Health and Safety, Brussels, Belg.), March 2000, at 3–5.

94. *See also* Picciotto, *supra* note 35.

95. *Third World Intellectuals and NGOs Statement Against Linkage* (TWIN-SAL) (Consumer Unity & Trust Society, India), Sept. 15, 1999, *available at* http://www.cuts-india.org/wto-campaign.htm. This initiative has been strongly influenced by the thinking of one of the Statement's signatories, Jagdish Bhagwati, on which, *see further* JAGDISH N. BHAGWATI, FREE TRADE, FAIRNESS AND THE NEW PROTECTIONISM: SOME REFLECTIONS ON AN AGENDA FOR THE WORLD TRADE ORGANISATION (Institute of Economic Affairs, Occasional Paper 96, 1995).

96. *See Enough Exploitation Is Enough: A Response to the Third World Intellectuals and NGOs Statement Against Linkage* (TWIN-SAL) (International Confederation of Free Trade Unions, Brussels, Belg.), Sept. 29, 1999.

97. *See* ASEAN Framework Agreement, *supra* note 40.

are more development oriented and more sensitive to environmental and social issues. Secondly, in regard to the United Kingdom's policy in this area, the Department of Trade and Industry (DTI) itself asked the question of whether there is a high priority for action on investor protection rules based on nondiscrimination given the existing network of bilateral investment agreements.[98] On the other hand, the DTI believes that there is scope for action to create a single, transparent, nondiscrimination framework that preserves the right of governments to pursue their social, environmental, and economic objectives.[99] Should the government pursue such an objective, it is crucial that it carries a truly representative voice into negotiations. To this end, it may be necessary to establish improved systems of policy development, building on the informal networks already in existence, and accounting for not only the views of civil society, but the views of local and regional interests in relation to inward investment. This is given greater weight in the light of the establishment of Regional Development Agencies and of the devolution of inward investment issues to the Scottish Parliament and Welsh Assembly. It may require more formal structures than exist at present for inputs from the regions (for example, in the work of the DTI's Industrial Development Unit) and a degree of regional representation on negotiating teams. In this way, a more balanced and acceptable position on a future multilateral framework for the regulation of investment may emerge.

98. *See DTI International Investment: The Next Steps*, July 12, 1999, at ¶ 12. These views are in contrast to the more positive stance taken on the need for multilateral investment rules by Clare Short, the Secretary of State for Overseas Development, *see supra* note 5. A view similar to that expressed by the DTI was echoed by the Business and Industry Advisory Committee of the OECD when it became apparent that the MAI negotiations were stalling.

99. *See id.* at ¶ 45.