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Recommended Citation

Canner, Stephen J. (1998) "The Multilateral Agreement on Investment," *Cornell International Law Journal*: Vol. 31: Iss. 3, Article 9.
Available at: <http://scholarship.law.cornell.edu/cilj/vol31/iss3/9>

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The Multilateral Agreement on Investment

Stephen J. Canner*

Introduction

On May 25, 1995, Ministers of the Organisation for Economic Co-operation and Development (OECD) launched a negotiation for a Multilateral Agreement on Investment (MAI). The statement by the Ministers identified three major pillars: a broad multilateral framework of rules for investor protection, the liberalization of investment regimes, and effective dispute settlement procedures. The Ministers also stated that the agreement should be open to accession by non-OECD countries, and that the agreement was to be concluded by May 1997.¹

The purpose of the negotiations was to establish worldwide rules for investment, similar to the rules for trade within the GATT and WTO. Specific rules for investment and liberalization of restrictions would promote competition and economic efficiency across and within markets, encourage a broader dispersion of technology and capital, and enhance economic growth and a higher standard of living worldwide. Consumers would benefit directly from increased quality, wider choice, and lower prices on goods and services. Producers, who in today's global economy have no choice but to compete abroad, would benefit from a level playing field.

By opening the MAI to accession by non-OECD countries, those countries that have liberalized their investment regimes and welcomed investment could harmonize with "best practices" and anticipate greater flows of international investment. In the context of today's Asian financial crisis, accession to the MAI by Korea (an OECD member), and Singapore and Hong Kong (non-members who have expressed interest in acceding to the agreement), would send a powerful message to Asian countries and help attract long-term capital back to the region.

This paper reviews the objectives of the negotiations for a Multilateral Agreement on Investment. The paper begins by addressing the question "Why MAI?" and then summarizes earlier attempts to deal with investment

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1. See Organisation for Economic Co-operation and Development (OECD), *A Multilateral Agreement on Investment: Report by the Committee on International Investment and Multinational Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT)* (May 25, 1995) <<http://www.oecd.org/daf/cmis/mai/mairap95.htm>>.

issues in bilateral investment treaties (BITs),² OECD Codes,³ WTO rules,⁴ and Chapter Eleven of the North Atlantic Free Trade Agreement (NAFTA).⁵ The paper then addresses the issue of the appropriate negotiating forum — OECD or WTO. This discussion is followed by a presentation of the basic rules that should be incorporated into the MAI. Next, the paper addresses the controversial issues of how exceptions to the basic MAI rules should be handled and the recent migration of non-MAI issues (labor and environment proposals) into the agreement. The paper concludes with a discussion of three critical points: a statement by the United States at the OECD high level meeting in February 1998 that it views the MAI as unready for ratification; the results of the ensuing OECD Ministerial in April 1998; and the author's view of "where we go from here."

I. Why MAI?

A. Globalization

Globalization is not a new phenomenon. However, the surge in globalization, particularly in the past ten years, has focused attention on the importance of international investment. Multinational enterprises know that, to be competitive, they must function in a global economy in virtually all facets of their business, including the design, development, production and sale of goods and services. This often requires that a company establish a physical presence in overseas markets so that it can hire local employees, participate in local research and development consortia, access skills and technology not available in the home market, and grow close to its customers. Such a physical presence can only be achieved through direct investment.

As Larry Bossidy, Chairman and CEO of Allied Signal explained:

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.⁶

The increasing role of technology in global markets places an even higher premium on the ability of firms to invest across borders. The pace of technological development has shortened the life cycle of products dramatically, requiring new and more costly investments to deliver the technology to the production stage. The accelerating cost of technological development compels companies to seek business partners from other countries to develop new technologies. Direct investment provides the vehicle and the flexibility for firms to achieve these objectives.

2. See *infra* Part II.A.

3. See *infra* Part II.B.

4. See *infra* Part II.C.

5. See *infra* Part II.D.

6. U.S. COUNCIL FOR INT'L INV., A GUIDE TO THE MULTILATERAL AGREEMENT ON INVESTMENT (1996).

The rapid increase in globalization demands increased international cooperation for the world economy to maximize the efficient use of the world's scarce resources. Of course, to achieve the highest standard of living, this must be done in a manner consistent with sound environmental principles.

B. The Rise of International Investment

Globalization, the rapid pace of technological advances, and the liberalization of governments' laws and practices have each contributed to the dramatic increase in the flow of cross-border investments in the past ten years. Consider the following:

- In 1985, annual outflows of direct investment were \$50 billion a year; in the next ten years investment flows increased six-fold to \$300 billion per year. By the end of 1996, flows of direct investment were nearly \$350 billion. Some eighty-five percent of these flows are accounted for by developed countries.⁷
- Developing countries seeking access to global markets through investment constitute the remaining fifteen percent, or \$50 billion, of direct investment outflows. This represents a more than six-fold increase from their 1991 investment flows.⁸
- There is a widespread trend toward liberalization of investment regimes. In 1991, thirty-five countries introduced eighty-two changes in their investment regimes; all but two of these changes were liberalizing. In 1995, nearly twice as many countries introduced 112 changes in their investment regimes. All but six of these changes were liberalizing.⁹
- There is substantial evidence that trade and investment are closely related. As firms invest more abroad, they export more from their home countries. For example, 1996 merchandise exports from U.S. companies with global operations were \$360 billion, an amount equal to sixty percent of U.S. exports.¹⁰
- Firms with global operations generate financial returns that are important for their companies and their economies. It is not unusual today for a U.S. company to have upwards of fifty percent of its annual revenue produced by sales, profits, royalties, and returns on overseas investments. In the aggregate, U.S. firms repatriate to the United States more than fifty percent of the profits of their overseas subsidiaries.¹¹

C. The World's Largest Investors

Who are the world's largest providers and recipients of international investment? The United States accounts for the largest amount of both invest-

7. U.N. CONFERENCE ON TRADE AND DEV., *WORLD INVESTMENT REPORT*, ANNEX I, II, U.N. Sales No. 97.II.D.13 (1997) [hereinafter WIR 1997].

8. *Id.*

9. *Id.* at 132.

10. See Raymond J. Mataloni, Jr., *U.S. Multinational Companies Operations in 1995*, SURV. OF CURRENT BUS., Oct. 1997, at 44, 50.

11. See *id.*

ment inflows and outflows, which total \$84.6 billion and \$84.9 billion, respectively. The United Kingdom and Germany rank a distant second and third, with outflows in 1996 of \$53 billion and \$29 billion, respectively. China is the second largest importer of direct investment, with inflows of \$426 billion, followed by the United Kingdom and Germany, with direct investment inflows of \$30 billion and \$21 billion, respectively, in 1996. Among developing countries, Hong Kong, Singapore, China, Korea, Taiwan, Argentina, and Brazil account for the lion's share of outward investment flows.¹²

II. Early Attempts for International Rules

Prior to launching the MAI negotiations, rules governing international investment and investors were dispersed throughout a number of bilateral investment treaties, OECD Codes, regional agreements such as Chapter Eleven of the North Atlantic Free Trade Agreement (NAFTA), and provisions in World Trade Organization (WTO) agreements (e.g., the General Agreement on Trade in Services (GATS) and Trade Related Investment Measures (TRIMS)). However, there was no comprehensive set of rules to help reduce barriers to investment or to protect the flow of international investment from arbitrary and discriminatory trade practices.

A. Bilateral Investment Treaties (BITs)

BITs, as the name implies, are treaties under which two countries agree to protect their investments in each other's territory. They embrace traditional investment treaty concepts such as national treatment, most favored nation (MFN), transfers of capital, and expropriation of property and procedures to settle disputes.

The initiative to negotiate investment treaties began with a bilateral treaty between Germany and Pakistan in 1959. By 1991, Germany led the world in negotiating investment treaties with seventy-seven, followed by Switzerland, France, the United Kingdom, and the Netherlands. As of 1996, there were some 1600 investment treaties in force worldwide, the majority being between European and developing countries.¹³ The United States, which did not begin its bilateral investment treaty program until 1982, had concluded forty-one BITs by 1996.¹⁴

The quality of these 1600 bilateral treaties varies from country to country. For example, most BITs provide for national treatment, which generally prohibits discrimination *between* domestic and foreign investors,

12. Compiled from tables in WIR 1997, Annex I and II, *supra* note 7.

13. See U.N. CTR. ON TRANSNAT'L CORPS. AND THE INT'L CHAMBER OF COMMERCE, *BILATERAL INVESTMENT TREATIES, 1959-1991*, at 8-10, U.N. Doc. ST/CTC/136, U.N. Sales No. E.92.II.A.16 (1992).

14. Testimony of Alan Larson, Assistant Secretary of State for Economic and Business Affairs, *The Multilateral Agreement on Investment: A Work in Progress*, Testimony before the House International Relations Committee, Sub-Committee on International Economic Policy and Trade 2 (Mar. 6, 1998) (transcript with author) [hereinafter Larson Testimony].

and most favored nation (MFN) treatment, which prohibits discrimination by a host government *among* all of its foreign investors. However, many treaties provide only for a MFN commitment, which permits a host government to discriminate equally against all foreign investors compared to domestic firms.

Many European BITs do not provide for national treatment with regard to a foreign investor's *right to establish* in its markets without being subject to discrimination by the host government. This gives domestic competitors a protected position in its markets, denies foreign investors a level playing field, and inhibits competitive forces from generating the highest standard of living and most efficient use of scarce capital resources. In addition, European BITs generally do not ban performance requirements such as export mandates or local content.¹⁵

By contrast, the United States has fewer BITs than Europe, but the scope of treaty coverage is perhaps the most comprehensive of any of the major industrialized countries. The U.S. BITs provide for national treatment and MFN for the right to establish and operate a entity, a ban on a large number of performance requirements, transfers of profits and capital in a hard currency, expropriation provisions consistent with international law, and state-to-state and investor-to-state dispute settlement procedures.

BITs allow countries to take exceptions to specific provisions for policy reasons or to conform to existing laws that either limit or ban foreign ownership. For example, the United States maintains an exception in its BITs allow it to deny national treatment to foreign investors in several sectors, including atomic energy, licenses for broadcast, subsidies, and grants. The United States also maintains an exception to national treatment *and* MFN in other sectors, such as fisheries, air and maritime transport, and banking and insurance.¹⁶

B. OECD Codes¹⁷

In the post-war period, international trade and payments were hindered by high tariffs, quantitative restrictions on imports, and numerous restrictions on the convertibility and movement of capital. Formed in 1961, the OECD agreed to reduce obstacles to trade and to liberalize both inward and outward capital movements. This undertaking soon became manifest in two codes adopted in 1961: The Code of Liberalization of Capital Movements and the Code of Liberalization of Current Invisibles. In 1976, members drafted and approved a National Treatment Instrument.

The Code of Liberalization of Capital Movements requires OECD members to commit to a free flow of capital (both inward and outward),

15. See U.N. CTR. ON TRANSNAT'L CORPS. AND THE INT'L CHAMBER OF COMMERCE, *supra* note 13, at 8-10.

16. Office of the United States Trade Representative, Prototype Treaty Concerning the Encouragement of Reciprocal Protection of Investment, Washington, D.C.

17. See generally OECD, INTRODUCTION TO THE OECD CODES OF LIBERALIZATION OF CAPITAL MOVEMENTS AND CURRENT INVISIBLE OPERATIONS (1995).

and provides for the right of establishment. The guiding principle of the Code is non-discrimination.

OECD members are permitted to lodge reservations, exceptions, and derogations to the Code where full and immediate compliance is not possible. However, for most types of capital movements, most members also commit themselves to the "standstill" (no introduction of new restrictions) and "rollback" (removal of restrictions) provisions.

The Code of Liberalization of Current Invisibles covers a very wide range of current account operations, including transfers associated with general business. As with the Code for Capital Movements, members commit themselves to a standstill by not introducing new restrictions, to a rollback of existing restrictive measures, and to non-discriminatory application to all members.

The two Codes have the legal status of an OECD decision, which is binding on all of its members. However, the Codes do not provide for a formal dispute settlement mechanism, relying instead on peer pressure applied through the process of notification, country examinations, and consultations to ensure compliance.¹⁸

The National Treatment Instrument (NTI) commits OECD members to apply national treatment to a foreign investor that has established investment. The NTI does not extend to the right of establishment. Unlike the Codes, the NTI is voluntary and is not considered binding on OECD members. However, like the Codes, it includes the practice of country examinations and consultations to encourage countries to eliminate measures that discriminate against foreign investors.

The OECD Codes provide a useful but incomplete basis for a comprehensive agreement on investment. Their major contribution has been to encourage liberalization over time to the point where virtually all capital movements are covered and where the number of exceptions lodged by individual countries have been significantly reduced over the past thirty years. However, the Codes do not have the backing of a formal dispute settlement mechanism that would permit governments or investors to seek redress for alleged violations by any of the OECD members.

C. WTO Instruments: GATS and TRIMS

The multilateral trading rules traditionally have focused on cross border movement of goods, and, more recently, services. However, as trade and investment became more integrally related, some GATT rules relating to the treatment of foreign persons/companies were developed. The primary emphasis of these rules concerns the impact of restrictions on foreign persons/companies as they relate to trade, rather than with fundamental concerns of investors such as the right of establishment.

18. *Id.* at 9.

1. GATS

The inter-relationship between trade and investment is most clearly evident in GATS. Negotiated as a "new issue" in the Uruguay round, GATS was the first legally enforceable multilateral agreement covering trade and investment in the services sector. It was designed to reduce or eliminate governmental discrimination against foreign entities that provide services. Of the four methods by which a service may be supplied, GATS identifies two that are of direct interest to investors: the commercial presence of one member in the territory of another (establishment) and the presence of personnel of a member in the territory on another member (movement of personnel).¹⁹

In part, the GATS contains several obligations of importance to foreign investors, including national and most favored nation treatment, restrictions on quantitative limitations, prohibitions on certain transfers and payments, and transparency requirements to publish government rules regarding trade in services.

However, the structure of the GATS and the nature of many of its obligations do not fully address investors' concerns. For example, some rules, such as those providing for national treatment, do not involve principles of general application (the "top-down" approach), but apply only to those sectors that are specifically listed (the "bottom-up" approach). Even in the bottom-up approach, national treatment may be only conditionally or partially granted.

The GATS also lacks many important protections found in bilateral investment agreements: GATS does not contain an absolute ban on performance requirements; no provision is made to ensure that investors and their investments are provided fair and equitable treatment under international law; and there is no provision for investor compensation.

2. *Trade Related Investment Measures (TRIMS)*

In discussions leading up to the launching of the Uruguay Round, the United States sought to establish broad, comprehensive rules for investment, reflecting in large part the provisions of its BITs. However, the United States faced strong opposition from developing countries that opposed a broad-based discussion of investment in the trade negotiating forum of the GATT. As a result, negotiators eventually cast aside any notions of broad investment disciplines and agreed to discuss only investment as it related to trade.

The agreement that emerged is designed to ensure that governments do not implement policies that would create trade restrictions or distortions. The agreement expands the requirements of the 1994 GATT to require WTO members to provide national treatment to imported products and refrain from imposing quantitative restrictions, such as quotas, on the

19. General Agreement on Trade in Services, Dec. 15, 1993, 33 I.L.M. 44, 48.

import or export of goods.²⁰

The agreement applies solely to investment measures taken by WTO members relating to trade in goods. It requires each member government to refrain from applying trade related investment measures inconsistent with GATT Articles III and XI. It also provides an illustrative list of TRIMs deemed to be inconsistent with these articles:

- local content requirements,
- limiting imports or balancing imports and exports,
- limiting imports by restricting access to foreign exchange related to earnings (foreign exchange balancing), and
- placing limits on an enterprise's exports.

The agreement provides for notification and phase out within two, five, and seven years for developed, developing, and least developed countries respectively.²¹

D. NAFTA

NAFTA's Chapter Eleven provides for the most comprehensive treatment of investment. It is the first investment agreement involving more than two parties. Substantively, Chapter Eleven embraces and exceeds the provisions embodied in the OECD Codes and the WTO provisions on TRIMs. Among other things, it provides for an "investor-to-state" dispute settlement procedure, bans a far more comprehensive list of performance requirements than the TRIMs, and provides for expropriation consistent with international law and transfers of capital and profits. In sum, the investment chapter of NAFTA permits cross border investment to take place in Mexico with far fewer government restrictions, and with no new restrictions in either Canada or the United States.²²

From the perspective of an international investor, NAFTA rules on investment were a quantum leap forward. The rules not only established a floor under a number of measures Mexicans were liberalizing on their own account, but also provided for new liberalizations and an investor-to-state dispute settlement mechanism through binding arbitration. Prior to NAFTA, investors had to settle their disputes within the Mexican court system.²³

To help ensure that the potential benefits of NAFTA were not diminished by an intrusive tax regime, NAFTA was accompanied by a bilateral tax treaty between the United States and Mexico. The major function of the companion tax treaty was to prevent discrimination, double taxation,

20. Agreement on Trade Related Investment Measures, Apr. 15, 1995, annex 1A, to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 125 (1994).

21. *Id.*

22. See Edward M. Graham & Christopher Wilkie, *Multinationals and the Investment Provisions of the NAFTA*, 3 INT'L TRADE J. 9 *passim* (1994).

23. Unlike the dispute settlement procedures in trade, which permit for retaliation in trade across sectors, the dispute settlement mechanism in investment permits the right of private action and relies primarily on an award of money damages. Cross retaliation is not permitted.

tax avoidance and evasion, and to lower and lock in Mexican and U.S. tax rates. These treaty provisions serve to provide greater stability and certainty for investors.

Exceptions played an important role in this agreement. Like bilateral investment treaties, the NAFTA investment provisions were also subject to a number of exceptions. For example, Mexico excluded the petroleum sector,²⁴ the United States excluded the maritime sector,²⁵ and Canada continued its exclusion of cultural measures from the U.S.-Canadian Free Trade Agreement.²⁶ Despite the absence of progress in opening these sectors to foreign investment, progress was made in a broad sense insofar as each government committed that certain exceptions would be subject to a "standstill" or a "freeze." That is, exceptions could not be made any more restrictive than they presently were (Annex I restrictions). Other restrictions (Annex II restrictions) remained open-ended and could be made more restrictive. For example, the United States agreed that its exception to national treatment for the Atomic Energy Act, the Mineral Lands Leasing Act, and the Federal Aviation Act of 1958 would not be made more restrictive. However, open-ended exceptions for national treatment and MFN were registered for other activities such as providing preferences for socially or economically disadvantaged minorities and maritime services.²⁷

III. OECD vs. WTO

In the run-up to the launch of the negotiations, a vigorous debate took place as to the appropriate forum for these negotiations. The European Commission and Sir Leon Brittan argued strongly for the WTO on the grounds that the "real" investment problems were in lesser developed countries (LDCs). As LDCs were members of the WTO and not the OECD, the conclusion was drawn that the WTO was the appropriate forum. As Sir Leon put it: "It is not realistic to expect the dynamic economies of Asia and Latin America to sign up on a take-it or leave-it basis to an OECD book of rules in whose compilation they have played no part. Hence the need for the WTO to get involved. [sic]"²⁸

This argument is intuitively compelling but misses several important points. As pointed out by Graham and Wilkie,²⁹ a WTO agreement on investment would necessarily have to cover new areas beyond the competence that the WTO was granted (e.g., the right of establishment) to be effective. Achieving this goal would go far beyond TRIMs and would, in and of itself, require extensive negotiations; it would probably hamstring the negotiations at the outset.

24. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., Annex I-VII, 32 I.L.M. 605 (1993) [hereinafter NAFTA].

25. *Id.*

26. *Id.*

27. *Id.* at I-U-1 to 23, II-U-1 to 13.

28. *Investment Pact Should Be Sought in Both OECD and Worldwide Basis*, FIN. TIMES, Oct. 30, 1996, at 1, 21.

29. See Graham & Wilkie, *supra* note 22, at 103.

In contrast, the United States, Germany, the United Kingdom, the Netherlands, and other nations felt that the argument for holding the negotiations in the OECD was more compelling. OECD negotiations would not be constrained by any trade-related link. The shared experience of OECD countries in advancing the OECD Codes, and their common view on investment principles, offered a better chance for success.

Tactics were also a compelling factor in selecting the OECD as the forum. OECD member countries were keenly aware of the successful efforts by LDCs to water down the TRIMS negotiation and did not want to ignite a "race to the bottom," which OECD members felt would ensue in the WTO. So the strategy was to:

- negotiate a high standards agreement among OECD like-minded countries and clean up the remaining investment restrictions on their books;
- encourage like-minded LDCs that have liberalized their investment regimes to accede to the agreement (e.g., outreach seminars and participation in the negotiations in an observer capacity have been undertaken);
- when concluded, open the agreement to accession to non-OECD members; and
- ultimately integrate the MAI disciplines into the WTO. The important element here is that such an agreement would have high standards, provide for liberalization of investment restrictions, and have the signature and support of a core group of like-minded developed and developing countries. Ideally, the MAI would be concluded within its two-year frame (May 1997), thereby creating the opportunity to integrate it into the WTO Ministerial of 1999.

IV. Key Features of the MAI³⁰

To realize the full potential of investment flows, the rules must be as comprehensive as possible:

- all laws, regulations and procedures should be transparent and available to the public;
- the rules should reach virtually every type of asset: plant inventory, financial assets, intellectual property, etc. This definition reflects the broad variety of potential corporate investment strategies.
- investors and their investments should be treated fairly and equitably by governments with regard to local competitors when they go abroad to establish and operate an enterprise. In technical terms, the MAI should provide for national treatment (i.e., policy treatment that is no worse than it is for domestic competitors to ensure a "level playing field").
- all foreign investors should be treated the same by the host government (i.e., MFN treatment).
- investors should be free of discriminatory government-imposed costs. For instance, it is unfairly burdensome to require a foreign investor to purchase a certain quantity of inputs from local suppliers, to export a

30. See generally U.S. COUNCIL FOR INT'L INV., *supra* note 6.

certain portion of production, or to transfer certain technologies, etc. These requirements generally do not apply to a domestic firm. They are expensive for the foreign investor to implement and hurt suppliers in the investor's home country, who would otherwise supply the investor in the overseas market or secure the export to third markets on the basis of their cost and quality.

- investors need the right to seek to minimize confiscatory and complex tax regimes that can impede and distort investment decisions.
- investors need the flexibility to move key personnel and their families to any of their facilities without incurring cumbersome immigration requirements.
- MAI should have a provision on transfers to respond to market demands and deploy financial resources quickly, flexibly, and to adjust them when necessary.
- investors should have protection against arbitrary seizures by governments. MAI should contain a provision on expropriation consistent with international legal standards. Takings should only be for a public purpose, and there should be prompt, adequate, and effective compensation for any such takings. From a U.S. perspective, this provision should go no further than the Fifth Amendment of the Constitution, which prohibits takings without due process of law and compensation.
- investors need the option of moving quickly and directly to challenge discriminatory and arbitrary actions taken by governments on individual deals. MAI should provide for investor-to-state as well as state-to-state binding dispute procedures.
- investors need to be assured that their investments will not be held hostage to the host government that seeks to enforce its laws extraterritorially.

Like the WTO, it is unrealistic to envisage an investment agreement that compels a government to change its laws. An award of monetary damages should suffice to remind governments that they cannot violate the terms of the agreement without penalty.

V. The Difficult Issues: Helms-Burton, Exceptions, Labor Standards, Environmental Proposals

A. Helms-Burton

In March 1996, the U.S. Cuban Liberty and Democratic Solidarity Act, better known as Helms-Burton, became law.³¹ Title III of the act allows U.S. citizens and corporations whose property was confiscated by the Cuban government any time after January 1, 1959, to bring suits for damages in U.S. courts against anyone who "traffics" in their former property at any time after November 1, 1996.³² Title IV prohibits entry into the United States by persons who traffic in confiscated property, as well as their fami-

31. Cuban Liberty and Democratic Solidarity Act, 22 U.S.C. § 6021 (1996).

32. *Id.* § 6082.

lies, after March 12, 1996.³³ The President has waived Title III provisions every six months; there is no waiver authority for Title IV.³⁴

The Helms-Burton Act created a fierce foreign policy conflict between the United States, the European Union, and Canada for its extra-territorial reach to enforce U.S. law. In October 1996, the EU filed a complaint against the United States in the World Trade Organization (WTO). It alleged that Helms-Burton violated the WTO by creating "extra-territorial" means to achieve the law's objectives and the threat and imposition of trade sanctions. Intensive diplomatic efforts ensued to persuade the EU not to proceed with its case and on April 11, 1997, U.S. Under-Secretary of Commerce Stuart Eizenstat and Commissioner Sir Leon Brittan of the EU negotiated an understanding to:

[d]evelop agreed disciplines and principles for the strengthening of investment protection, bilaterally and in the context of the Multilateral Agreement on Investment. . . . [T]he standards of protection governing expropriation . . . envisioned in the MAI should be respected by all States . . . [and they] should inhibit and deter the future acquisition investments from any State which has expropriated . . . investments in contravention of international law³⁵

The negotiators established a deadline of October 15, 1997, which was later extended to May 1998. During the interim, the United States agreed to continue its suspension of Title III and to seek from Congress a legislative waiver of Title IV. In turn, the EU agreed to suspend its challenge of Helms-Burton in the WTO.³⁶ The negotiations on Helms-Burton were undertaken outside of the OECD negotiations on MAI. However, the EU (and Canada) indicated to MAI negotiators, who would develop disciplines on expropriation in their own right, that the MAI agreement could not be concluded until such time as there was a successful resolution of the separate negotiations on Helms-Burton.

An "Understanding" between the EU and the United States was reached on May 18, 1998, whereby the two sides agreed on a set of disciplines for countries that have expropriated properties and for countries with an established record of repeated expropriation, such as Cuba.³⁷ The disciplines would also be introduced into the MAI. In addition, the United States is obliged to provide a waiver of Title III without time limits and to change the law to permit and implement a waiver of Title IV. These changes will require legislative action.

In a unilateral statement on May 18, 1998, EU President Santer and U.K. Prime Minister Blair made clear three conditions for entry into force and EU adherence to the agreement: the United States must continue to

33. *Id.* § 6091.

34. *Id.* at § 6091(c).

35. U.S. Dep't of Commerce, *Understanding Between the United States and the European Union*, NEWS, Apr. 11, 1997.

36. *Id.*

37. The "Understanding" and accompanying statements are reprinted in *INSIDE U.S. TRADE*, May 22, 1998, at 1, 21-30.

waive Title III of Helms-Burton without time limit, the United States must obtain and use waiver authority for Title IV from Congress, and the United States must not take action against EU companies or individuals under the Iran-Libya Sanctions Act.³⁸

B. Exceptions: The General Issue

After two years of negotiations, OECD governments had nearly completed a text providing a basic framework of rules. This is the “easy” part. The next step is to identify and negotiate a reduction in the number of exceptions desired to a level that yields true liberalization and a balance of benefits among negotiating countries. These two elements – reduction in restrictions and a balance of benefits – are critical for the agreement to achieve the requisite support.

As envisaged by the negotiators,³⁹ the only exceptions permitted would be those listed when adhering to the agreement. These exceptions would be subject to progressive liberalization and should produce a balance of commitments among the participants.

As matters unfolded, different approaches were proposed by negotiators. One approach would enable a country to entirely “carve out” a sector from the reach of the agreement. This gives rise to several difficulties. Carve outs, by definition, lack the transparency required by investors. Foreign investors can never be sure what is or is not included in the sector or measure that is carved out. This leaves the possibility that governments will impose new, restrictive measures in the sector that is carved out. Also, sectors or measures that are carved out leave investors with no redress. If the sector is not subject to the rules, one cannot invoke dispute settlement procedures. Carve outs can also drive a negotiation to the lowest common denominator. If, for example, two or three countries succeed in having a sector or measure carved out, all countries are denied the ability to offer the protections of the agreement to their foreign investors. Thus, a handful of countries can easily diminish the value of an agreement by insisting on carve outs.

A second approach is to have *individual* countries request exceptions for *specific measures* and to have those measures clearly listed in the agreement. This approach avoids many of the disadvantages of carve outs, since it provides the transparency and clarity that investors require. Moreover, the individual/country specific approach is selective. It limits exceptions to those countries that truly need or want them for economic or political reasons while permitting other countries to remain open to foreign investment in keeping with MAI rules.

A third approach, which has been used in OECD Codes, is “standstill and rollback.” This method is used with countries seeking OECD membership and with existing members at periodic reviews. Simply stated, the

38. *Id.*

39. See OECD, REPORT BY THE COMMITTEE ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES TO THE COUNCIL OF MINISTERS (1995).

"standstill" provision commits countries to refrain from rendering their investment rules any more restrictive than at the time of membership. "Rollback," as the name implies, commits countries to reduce the level of those restrictions, with some reduction taking place at the time a country joins the OECD, and other reductions scheduled at a later date. An added feature to this approach is the "ratchet": once a country liberalizes an investment measure, the liberalization cannot be removed. Thus, liberalization has an upward ratchet effect.

When Korea acceded to the OECD, it followed the principles of standstill and rollback. In addition to agreeing to a standstill, Korea agreed to liberalize numerous investment measures. For example, it agreed to reduce the ceiling on the total amount of domestic securities that can be issued abroad and relax progressively existing ceilings on foreign portfolio investment in Korean stocks.⁴⁰

In the MAI negotiations, it has been reported that most European countries preferred the standstill/rollback approach because they had experienced this approach in previous OECD negotiations. Several countries, however, objected. The United States, Mexico, and Canada pointed out that standstill and rollback would conflict with the exceptions they took in NAFTA, where they had agreed among themselves that certain exceptions would be subject to standstill while others would remain open-ended. Accepting the European approach that *all* investment laws be subject to standstill would upset the balance of benefits they achieved in NAFTA, and arguably would impede their ability to obtain a balance of benefits among all MAI parties. As a result, the United States, Canada, and Mexico argued for a listing of all exceptions, followed by negotiations on those exceptions to achieve a balance of benefits.

Can agreement be reached on an architecture for negotiating exceptions? Unfortunately, not much progress has been made in resolving the issue. In early 1997, it became clear that the issue would not be resolved in time to meet the target deadline of May 1997. Consequently, Ministers extended the deadline to May 1998. But even with this extended period of time, negotiators have not been able to fully address this important issue, and it is not clear how or when it will be resolved.

VI. Country requests for exceptions

There is currently no publicly available list of exceptions requested by country negotiators. But that information which has been gleaned through conversations and articles in the press reveals the different approaches countries are taking to exceptions.

A. Culture

It should come as no surprise that France and Canada would seek an exception for culture. In article 2005 of the Canada-U.S. Free-Trade Agree-

40. Robert Ley & Pierre Poret, *The New OECD Members and Liberalisation*, OECD OBSERVER, Apr. 14, 1997, at 38.

ment, Canada exempted all cultural industries.⁴¹ But Canada provided transparency to this exemption by listing in article 2012 of the agreement those activities it considered to be cultural, such as books, magazines, video, music, print, and radio communications.⁴²

In the GATS, France, along with other members of the European Community, took an MFN exception for cultural activities to permit the EU and its members to liberalize among themselves in cultural activities without extending those liberalizations to non-EU countries. As required by WTO rules, the Commission listed its cultural activities in the appropriate GATS schedules of exceptions.⁴³ In the MAI however, it is reported that France and Canada seek a total carve out for culture with no listing of what would or would not constitute cultural measures. A carve out of this nature would thus go beyond the exceptions that already exist from previous negotiations and allow any country the ability to introduce new discriminatory "cultural" measures without accountability or redress by foreign investors.

The desire for carve outs goes beyond culture. The European Union, which will be a signatory to the MAI, seeks a carve out for Regional Economic Integration Measures (REIOs). A REIO is an organization of sovereign States that have committed themselves to abolish, in substance, all barriers to investment among themselves and have transferred competence on the investment issue to the European Commission. The REIO exception, if granted, would enable the Commission to discriminate favorably among its members. Third parties to the MAI would not receive the same treatment as a REIO member. In addition, prospective member states of the Commission may seek REIO status even before they are actually admitted to the European Union.⁴⁴

There are several problems with the REIO clause. As a general matter, it introduces a measure of uncertainty and lack of transparency in investment rules that are designed to promote certainty and transparency. It would extend provisions to countries that are not yet members of the EU and may not become members for a considerable period of time, and it assumes that non-EU members would accept new discriminatory measures or measures of "preferential liberalization" without redress.

Privatization programs provide a good example of the dangers of preferential liberalization. New opportunities for foreign investors will occur under privatization programs in acceding states. Consistent with the national treatment provision, this liberalization should apply to *all* MAI countries, not only to ensure fairness, but to ensure that privatizing firms

41. See Canada-U.S. Free Trade Agreement, Jan. 1, 1989, 27 I.L.M. 281, 396 (1988).

42. *Id.* at 398.

43. European Commission, *Final List of MFN Exceptions of the European Community and its Member States*, MIN.GNS/W/228/rev.1 (Dec. 15, 1993).

44. Directorate for Financial, Fiscal, and Enterprise Affairs, OECD, *The Multilateral Agreement on Investment: The MAI Negotiating Text* (last modified Dec. 14, 1998) <<http://www.oecd.org/daf/cmis/mai/maixtext.pdf>> [hereinafter *MAI Negotiating Text*].

are given the opportunity to attract the most qualified buyer the market has to offer.

B. Labor and Environment

More than a year into the negotiations, there was pressure from non-governmental organizations (NGOs) to incorporate binding labor and environment provisions into the investment rules being negotiated. Concurrent with this effort, these groups used the absence of such provisions as grounds to oppose the agreement.

1. Labor

Binding labor standards should not be included in the MAI because it would open the door to the use of economic sanctions to enforce labor standards in business agreements. This is the same basis on which the business community has consistently opposed the "social clause." The social clause has long been the goal of U.S. and international labor movements. Some governments, led recently by the United States and France, have fought for the inclusion of a social clause in the World Trade Organization (WTO). While these efforts are largely based on a genuine desire to promote labor standards and workers' rights, they also lend themselves to easy exploitation by those espousing protectionism.

A major impediment to dealing with labor issues in the MAI lies in the definition of fundamental labor standards or workers' rights. While there is perhaps general agreement on certain elements of such a definition, once one moves beyond generalities, the details of what constitutes a core labor standard vary depending on the social, cultural, and economic situation of the country in question. For example, the International Labor Organization (ILO) and the Copenhagen Social Summit define core labor standards as the right to freedom of association and collective bargaining, non-discrimination and equal pay, and the prohibition of child labor and forced labor.⁴⁵ The NAFTA Labor Side Agreement, on the other hand, mentions eleven labor "principles," three of which (child labor, minimum wage, and safety and health) are so fundamental that infractions will lead to penalties in the form of snap-back tariffs.⁴⁶

It is likely that the MAI rules will ultimately be incorporated into the WTO. A MAI that incorporates the "social clause" is not likely to be enshrined in the WTO. Changing the basic ground rules of the WTO/GATT would require consensus from over 130 members, the overwhelming majority of which would never agree to such a measure. Developing countries in particular regard the social clause as anathema. As they are already WTO members under the pre-existing rules, such a fundamental change would constitute, in effect, a retroactive entry fee into the world trading

45. Copenhagen Declaration on Social Development, Mar. 12, 1995, UN World Summit for Social Development, U.N. Doc. A/CONF.166/9 (1995); International Labor Conference, 86th Sess., Provisional Record of Proceedings 20A (1998).

46. North American Agreement on Labor Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., Annex I, Labor Principles, 32 I.L.M. 1499 (1993).

system. Moreover, because of the strong protectionist implications, incorporating binding labor standards into a trade regime would make the regime itself highly unpredictable and arbitrary.

The same logic would apply to investment. Obviously, unpredictability and arbitrariness are anathema to investment. Developing countries would never join such a regime, and U.S. and international business would not support it.

2. *Environment*

There has been no stronger opposition to the MAI than that emanating from elements of the environmental community. Their opposition appears to be based on several factors.

First, even though the negotiations are now reasonably open for public sector comment, some environmentalists claim that the agreement was being negotiated in secret for nearly two years, without any advance notice or explanation of its goals or objectives to the public at large. Second, many environmentalists hold the view that economic growth and environmental protection are basically incompatible. Third, they believe the MAI will inhibit state and local authorities from taking measures to protect the environment (as well as health, safety and welfare) by the threat of foreign investors forcing states to binding arbitration over such measures.⁴⁷

All or virtually all international negotiations are “secret” in the sense that the public does not sit at the negotiating table, approving or disapproving its government’s negotiating tactics and positions. However, it is accurate that the MAI negotiations were launched with little notice or explanation to the public at large, other than the OECD Ministerial statement of 1995. Started as a major policy initiative, there is not a very good record of policy officials at the cabinet or sub-cabinet level in any OECD government going before their constituencies – labor, environmentalists, citizen groups, the business community – to explain the goals and objectives of the MAI, why it was being undertaken, and the benefits to be derived.

As a consequence, the NGO environmentalist community believes that it was left for them to discover the MAI after nearly a year and a half of negotiations. This infuriated them, led to charges of secret negotiations, and poisoned the atmosphere for a rational debate.

Protection of the environment and economic growth are not incompatible. As recently as January 1998, representatives of The World Business Council for Sustainable Development indicated that the free flow of capital can be a positive force in the pursuit of sustainable development:

- Agenda 21 adopted by the global community at the Rio Summit recognized trade liberalization as a positive force for supporting the most environmentally and economically efficient use of goods and resources and

47. See, e.g., Robert Stumberg, *Sovereignty for Sale: The MAI*, Testimony before the House International Relations Committee, Sub-Committee on Economic Policy and Trade (Mar. 5, 1998).

hence for contributing to sustainable development. Investment liberalization is a close relative of trade liberalization, and can be expected to produce a similar positive impact. . . .

- The MAI will also likely produce a greater willingness to include leading edge technologies with an investment . . . This aspect of the MAI is important to promoting sustainable development, especially in developing countries, through new environmental technologies as well as new industrial and commercial products and technologies that leave a smaller environmental footprint
- Foreign direct investment is already the leading contributor to development in the developing countries. The MAI can help expand this engine of growth, and multiply its impact in terms of sustainable development by promoting the inclusion of new technologies in the investment.⁴⁸

On another front, Public Citizen, a NGO associated with Ralph Nader, argues that the MAI's investor-to-state dispute settlement provision will constrain states from passing laws and regulations to protect health, safety, and the environment.⁴⁹ Public Citizen argues that the regulations may be deemed a "taking" or expropriation under the rules of MAI due to the reduction of value in a company's investment caused by environmental and health regulations. For example, in the case of a foreign investment, an investor could bring a state to arbitration under the MAI's investor to state dispute settlement procedure, obtain a favorable finding, and oblige the state to pay the investor money damages.⁵⁰

There are several compelling arguments against this line of thought. First, as in all treaties, the U.S. government, as the party to the MAI, would have to answer for any alleged violations of the agreements, not a state or local government. Second, the Supremacy Clause binds states to the terms of all existing Treaties of the United States.⁵¹ Third, with regard to "takings," the MAI echoes the Fifth Amendment of the U.S. Constitution – that there cannot be a taking without due process or just compensation.⁵²

As a practical matter, the MAI should pose no serious problems for states to take measures to protect the health, safety, or environment of its citizens *as long these measures are non-discriminatory*. This makes sense. Consider the following hypothetical example. Two plants, one foreign-owned, the other U.S.-owned, wish to establish a wood pulp facility on the Columbia river in Washington state. The Washington state authorities decide to raise the level of environmental protection to protect the Columbia river from environmental degradation. How should they proceed? Should there be one set of rules for the foreign-owned plant and another set of rules for the U.S.-owned plant? Or should there be one set of rules for

48. Memorandum from the World Business Council for Sustainable Development to Don Johnson, Secretary General of the OECD (Jan. 9, 1998) (on file with author).

49. Lori Wallach, MAI, Win, Lose, or Draw for the U.S.?, Testimony Before the House Committee on International Relations, Sub-Committee on International Economic Policy and Trade (Mar. 5, 1998) (visited Mar. 15, 1999) <<http://www.citizen.org/pctrade/mai/what%20is/testimony.htm>>.

50. *Id.*

51. U.S. CONST. art. VI, § 2.

52. *Id.* amend. V.

both plants, recognizing that what matters is not who *owns* the plant, but *the behavior* that is practiced.

Clearly, the behavior should be more important than ownership. For that reason, states should continue legislating and administering their health, safety, and environmental programs on a non-discriminatory basis. Beyond this general observation, it is important to recognize that any country may register an exception to the MAI rules to protect an *ipso facto* discriminatory program (e.g., a minority preference program in the United States).

With further reference to the so-called takings argument, the example cited by Public Citizen boils down to whether normal functions of government such as zoning, licensing procedures, and protecting the environment, are takings or expropriations.

Consider the views of Professor Ian Brownlie of Oxford University and Professor L. Oppenheim of the University of Cambridge:

State measures, prima facie a lawful exercise of powers of government, may affect foreign interests considerably *without amounting to expropriation*. Thus foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful *and do not constitute expropriation*. If the state gives a public enterprise special advantages, for example by direction that it charge nominal rates of freight, the resulting *de facto* or quasi-monopoly is not an expropriation of the competitors driven out of business.⁵³

Moving from theory to practice, it is instructive to note how institutions who insure against expropriation treat this issue. The World Bank's Multilateral Investment Guarantee Agency (MIGA) provides such insurance to investors and defines what is and what is not expropriation in Article 1.1 of its charter:

(a) [T]he agency may guarantee eligible investments against a loss resulting from one or more of the following types of risk:

(ii) Expropriation and Similar Measures

any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control or, or a substantial benefit from, his investment, *with the exception on non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories.*⁵⁴

Government negotiators struck a similar stance at the OECD high level meeting on February 16, 1998. On this issue, they agreed that "the MAI must not and will not undermine government authority to regulate for the protection of health, safety, and the environment. There is also a consensus that normal regulatory action, *even when it affects the value of invest-*

53. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 532 (4th ed. 1990) (emphasis added).

54. Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, ch. III, art. 11, (ii), T.I.A.S. No. 12089, 24 I.L.M. 1598 (emphasis added).

ments, should not be considered an expropriation or 'taking' requiring compensation."⁵⁵

3. *A Formula for Compromise?*

In an attempt to conclude the debate on labor and environment provisions, the Chairman of the MAI negotiating group Frans Engering proposed at the March 1998 negotiating session to include the following elements:⁵⁶

– *Non-binding language in the preamble of the agreement:* The preamble seeks to formulate concisely the inter-relationship of investment (as an engine of growth), sustainable development (as protection of the environment), and internationally recognized core labor standards.

– *An affirmation of the right to regulate:* This provision, drawn from NAFTA, states that a party "may adopt, maintain or enforce any measure it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety, or environmental concerns, provided that the measures are consistent with the agreement [non-discrimination/MFN]."⁵⁷

– *Not lowering measures:* This provision, also drawn from a NAFTA provision, states that a party shall not waive or derogate from its own domestic, health, safety, environmental, or safety measures to attract an investment.⁵⁸ Governments, however, must have the flexibility to adjust their overall health, safety, environmental, or labor standards for reasons other than attracting investment.

– *Expropriation:* "A party shall not expropriate an investment or take any measure tantamount to an expropriation . . ." The language is accompanied by an interpretive note stating that

measures tantamount to expropriation . . . reflect the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to the property is not taken. It does not establish a new requirement that parties pay compensation for losses which an investor may incur through regulation, revenue-raising and other normal activity undertaken by governments.⁵⁹

Presumably the government negotiators provided the new language to assuage the concerns of environmentalists that an investor could use the investor-to-state dispute settlement procedure against a state environmental measure deemed to be "tantamount to an expropriation."

– *Association of the Voluntary OECD Guidelines for Multinational Enterprises*

The Guidelines⁶⁰ constitute a voluntary set of recommendations to enter-

55. See Under Secretary of State Stuart Eizenstat & Jeffrey Lang, *U.S. Statement on MAI*, Feb. 17, 1998, reprinted in *INSIDE U.S. TRADE*, Feb. 20, 1998, at 17.

56. The Engering proposals are reprinted in *INSIDE U.S. TRADE*, Mar. 27, 1998, at 17-19.

57. *Id.* at 18.

58. *Id.*

59. *Id.*

60. OECD, *OECD Guidelines for Multinational Enterprises* 1994.

prises from OECD Governments to help insure that multinational enterprises "operat[e] in harmony with the policies of the countries where they operate."⁶¹ The Guidelines cover a number of functional areas including labor, environment, taxation, competition, science and technology, and disclosure of information. The OECD established the Guidelines in 1976 and updates them periodically. The most recent revision of the Guidelines took place in 1993. The OECD anticipates that the MAI Negotiating Group will annex the Guidelines to the MAI in a manner that does not change their voluntary nature.

Comment: This five point proposal remains on the table for further work and analysis. A number of important details warrant close scrutiny. For example, the "right to regulate" states that a government may take *any measure* to ensure that health and safety concerns are met. Should this language be so broad? Or following the precedent of the WTO's Phytosanitary Agreement, should such measures be subject to sound scientific standards and be based on scientific evidence?⁶²

Similarly, "not lowering measures" provision requires clarification. On its face, the provision seems logical and acceptable: a country should not violate its own laws to attract an investment from a foreign entity. How will the issue be settled if a country does violate its own laws, or if a third party merely asserts that a government has lowered its standards? Will legal standing be granted to third parties to address these types of cases? Will the dispute settlement procedure stop an investment until such time as the issue can be resolved? How can this provision be modified to prevent it from impeding the flow of international investment?

VII. The United States Says: "The MAI Is Not Ready for Our Signature!"

By the fall of 1997, the basic framework on investment protection articles was nearly completed but there was little progress on three key issues: U.S. and EU negotiators were far apart on any solution to the Helms-Burton legislation, an issue negotiated outside of the OECD but one that the Europeans stated was a *sine qua non* for concluding the MAI; there was little or no agreement on how to negotiate exceptions; and the environmental concerns were becoming highly contentious.

Concurrent with this state of affairs, labor and environmental groups laid claim to victory in defeating the U.S. Administration's request for fast track authority to negotiate trade agreements. Although the Administration's request did not include the MAI, the defeat of fast track and its commitment to greater liberalization of markets provided further fuel for the opponents to lobby against the MAI on radio talk shows and over the internet.

61. *Id.* at 3.

62. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, annex 1A-4 to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1125 (1994).

By the turn of the year, negotiators had only four months to conclude a deal. The issue was forced by the deadline of the April OECD Ministerial. Could the MAI Negotiating Group resolve the critical issues, including Helms-Burton?

The United States said no! At a high level meeting of MAI negotiators on February 16, 1998, U.S. policy officials elaborated that the fundamental problem was that other countries were seeking broad exceptions to the agreement (culture and REIOs) as well as specific country reservations that would dilute the quality of the agreement. Further, the United States stated that "it would be unrealistic to fully address the range of issues by the April deadline."⁶³

Representing a European view, Frans Engering, Chairman of the negotiating group, stated that the key issue was whether the United States had the political will to finalize an agreement in the face of an eroding consensus for liberalization: "[u]p to now, I feel here in Washington that they are so bogged down in problems that they cannot go on . . ."⁶⁴ He suggested that compromises could be found to limit somewhat the effects of an open-ended exception for REIOs. He further stated that the MAI negotiating group could resolve the cultural issue by mirroring the GATS exceptions for audio-visual services in the MAI and that negotiations to liberalize restrictions could be completed in a two-year time period, following the conclusion of the MAI negotiations. While Engering's proposal for resolving the cultural issue is appealing, the overall package was not acceptable to the United States. All reasonable people could agree on the idea of compromise on REIOs, but it lacked a detailed plan. What limits would the Europeans place on their desire for open-ended REIO authority, and what in return would the United States be willing to give up on open-ended exceptions of their own to conclude the deal? Beyond REIO, the United States rejected the Engering proposal to negotiate liberalization within two years time on the grounds that without liberalization there would be little to show for three years of effort. Moreover, with just 6-8 weeks before the Ministerial, it was unrealistic to expect that negotiations on exceptions could be conducted in a manner that would yield true liberalization and a balance of benefits to all parties.

In a formal statement released to the press on February 17, 1998, Under-Secretary of State Stuart Eizenstat and Deputy U.S. Trade Representative Jeffrey Lang reiterated the U.S. goal to "[s]eek a broad and effective MAI that meets United States objectives . . . [and that] it is very important to achieve a high quality agreement . . ."⁶⁵ While acknowledging the significant progress that was made on labor and environment, it was the desire for broad exceptions by other countries that prevented the United States from concluding the agreement before the April Ministerial. REIO was stood out as a major loophole:

63. See *INSIDE U.S. TRADE*, Feb. 13, 1998, at 1.

64. *Id.* at 25.

65. Eizenstat & Lang, *supra* note 55, *reprinted in INSIDE U.S. TRADE*, Feb. 20, 1998, at 17.

The proposal by the European community for an exception for a REIO raises a number of concerns. The proposal strikes at the core of the non-discrimination principle fundamental to MAI. The exception would deny other parties the benefits of liberalization which members of the EU provide themselves and . . . would allow member states to erect new barriers to our firms as they harmonize their policies to new Community standards.⁶⁶

VIII. The OECD Ministerial

In the two month interval between the OECD high level meeting and the Ministerial, advocacy groups in support of and opposed to the MAI accelerated their efforts to influence the outcome of the Ministerial.

Labor and environmental NGOs both here and abroad "spread their wildest fears about the secret [MAI] negotiations on the Internet . . ." ⁶⁷ Before long, they were sending each other apocalyptic e-mail messages about how the MAI was a transnational bill of rights for multinational companies that would rob national governments of sovereignty.⁶⁸

The business community urged governments to conclude the agreement. Writing to cabinet Secretaries and the U.S. Trade Representative, the company heads of the major business organizations — The Business Roundtable, The National Association of Manufacturers, The United States Council for International Business, The United States Chamber of Commerce, The National Foreign Trade Council, The Emergency Committee for American Trade, The Coalition of Service Industries, and the Pacific Basin Economic Council — stated that an MAI with high standards "is clearly in the national interest . . . [because] foreign investments by U.S. companies help to contribute to economic growth and sustain good paying jobs in the United States."⁶⁹ As for "exceptions," the CEOs said that: ". . . MAI must not include exceptions that can be used in the future to justify open-ended discrimination against U.S. companies and their workers."⁷⁰ The executives ". . . urged the Administration . . . to push forward with the OECD negotiations and try to bring them to a successful conclusion as soon as possible."⁷¹ Earlier in the year, the Business and Industry Advisory Committee to the OECD stated, "the international business community . . . supported it wholeheartedly; . . . [t]he Agreement . . . [would] serve as a catalyst for increased economic growth and employment by giving greater confidence to increase foreign direct investment flows."⁷²

Meanwhile, government changed their signals toward the MAI. What started out as a straight-forward exercise in investment protection and liberalization of restrictions now had other objectives. Testifying before Congress on March 6, 1998, Assistant Secretary of State Alan Larson noted that

66. *Id.*, reprinted in *INSIDE U.S. TRADE*, Feb. 20, 1998, at 18.

67. Editorial, *MONTREAL GAZETTE*, May 1, 1998, at B2.

68. *Id.*

69. Letter is reprinted in *INSIDE U.S. TRADE*, Apr. 24, 1998, at 24.

70. *Id.*

71. *Id.*

72. *BIAC Statement on MAI*, reprinted in *INSIDE U.S. TRADE*, Jan. 23, 1998, at 6-7.

"developing an international framework of foreign investment is not our only objective Another primary objective is to ensure that the MAI contributes to the achievement of our goal of fostering stronger global efforts to protect the environment, to respect internationally recognized core labor standards and to achieve sustainable development."⁷³ The upshot of these divergent views was that OECD Ministers decided on a "period of assessment and further consultation" between the negotiating parties and with "interested parties in their societies"⁷⁴ A communiqué set October 1998 as the date for the next negotiating session but there was no mention of concluding the negotiations by a certain date.

With regard to labor and environmental issues, Ministers sent a significant acknowledgment to the NGOs, stating that the Ministers "need to complete work on MAI disciplines . . . which take[s] full account of economic concerns and political, social and cultural sensitivities." Further, "the MAI . . . rules . . . would not inhibit the normal non-discriminatory exercise of regulatory powers by governments and such exercise of regulatory powers would not amount to expropriation."⁷⁵

IX. Where Do We Go From Here?

There is no easy answer to the future of the MAI. After three years of negotiations, much has been accomplished but much remains to be completed. There is a good text, reflecting provisions of the most comprehensive bilateral investment treaties and Chapter Eleven of NAFTA. Negotiators have thus far been unable to reach agreement on a method to deal with and limit exceptions. Further, the negotiating group must work out the details of labor provisions and environmental issues. Notwithstanding the serious challenge these factors pose, the author believes that countries should persevere and see the MAI to a successful conclusion:

- International investment flows, now at \$350 billion a year will continue to increase and serve as an engine of growth for developed and developing countries. The question is on what terms this investment will take place: on a rule-based system that establishes transparency, clarity, and freedom to compete on the basis of their offerings or on a system with no rules that enables governments to protect domestic markets?
- A rule-based system for investment is already on the agenda for the Free Trade Agreement of the Americas (scheduled to begin this fall) and the WTO is undertaking extensive preparatory work that may lead to an investment mandate in future trade negotiations. Negotiators should view these competitive undertakings as an incentive to finish the job in the OECD.

73. See Alan Larson, Assistant Secretary of State, *The MAI, A Work in Progress*, Testimony Before the House Sub-Committee on International Economic Policy and Trade 1, Mar. 6, 1998.

74. OECD, *MINISTERIAL STATEMENT ON THE MULTILATERAL AGREEMENT ON INVESTMENT* (Apr. 28, 1998).

75. *Id.*

- Helms-Burton, which had been a road block between the United States and the EU from moving forward in the MAI, may now be less problematic as a result of the U.S.-EU “Understanding.” The “understanding” must receive the tacit approval of Congress and necessary changes in the legislation must take place in order to implement the agreement. This will not be easy. The outlook for changing U.S. legislation in the near future is not good and this will have adverse ramifications for the conclusion of the MAI. Nevertheless, an opportunity now exists to take what was once a major point of contention in our commercial relations with Europe and use it as an important element of the MAI to establish rules and disciplines on expropriated investments among the world’s major investors.
- Once criticized as a “rich man’s agreement” because of its virtual exclusion of participation by developing countries, the MAI can now be recast as a powerful tool for LDCs in Asia to attract long term capital back to the region by acceding to the MAI. Korea, an OECD member, has been liberalizing its investment regime in the aftermath of its financial crisis, and Hong Kong and Singapore have also expressed interest in acceding to the MAI. If these countries do accede, other countries in the region will face the competitive challenge to establish sound investment regimes and could choose to join as well.

This is an immense challenge that cannot be dismissed. The “investment issue” will not go away and the opportunities cannot be ignored. MAI negotiators should conclude the agreement within the shortest time frame possible.

To do so, they will need to build a public case for the benefits of international investment and for a new investment regime, challenging directly those groups in the United States and abroad that are opposed to trade, investment, and economic growth. Countries must decide whether they are going to rise to this challenge or cede an effective veto over international economic policy to groups opposed to globalization.

A reversal in the productive post-war trend towards open markets is a distinct possibility unless governments exercise leadership in their dialogue with domestic constituencies. For better or worse, the MAI has become a litmus test in a battle to decide the shape and direction of the global economy as we enter the next century.

