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The MAI and the Politics of Failure: Who Killed the Dog?

Why did the MAI negotiations fail? This chapter explores two competing hypotheses. The first attributes their failure mainly to fundamental, substantive differences among the negotiating parties themselves that, in the end, proved irreconcilable. The second is that parties outside the negotiations (primarily a coalition of NGOs) were able to bring sufficient pressure to bear on certain of the negotiating parties to cause the negotiations to be terminated without conclusion. The first, "internal" hypothesis suggests that the MAI negotiations were doomed from the beginning. The second, "external" hypothesis implies, to the contrary, that the NGOs (and other opponents of globalization) were successful in derailing a train that otherwise would have reached its destination, albeit not without some long uphill climbs.

As noted in chapter 1, however, the two hypotheses are not that easily separable. Both internal and external factors clearly played major roles in the negotiations' failure, making it difficult to identify either as the fatal instrument. Certainly the negotiations were in deep difficulty well before the NGOs came on the scene. It is difficult to judge whether, if the external actors had never entered the picture, the internal differences were so deep and difficult as to put the negotiations on a one-way street to failure. Further complicating this issue, the business community—a constituency that supported the MAI effort—did not attempt to mount a serious countervailing effort to salvage the MAI once the NGOs did come on the scene. Had business leaders in the various OECD nations spoken out more loudly in favor of completing the negotiation, the outcome might have

been different. But the fact is that the business community in all OECD nations was largely silent on the issue. This poses a serious issue. Many of the groups protesting the MAI believed that it would create new and unprecedented benefits for business—benefits that would come at the expense of the ordinary person. Either these groups seriously overestimated the potential of the MAI to do this (the position generally taken here) or the business community seriously underestimated the potential value of the MAI to their own interests.

These are not trivial issues, nor are they of interest only to historians of the negotiations. The NGOs have loudly claimed credit for bringing the MAI down, and a widely held perception that this indeed was the case helped fuel the spirited protests at the WTO meeting one year later, and again at the World Bank and International Monetary Fund meetings in April 2000. In the eyes of many, the NGOs' sacking of the MAI established them collectively as a power to be reckoned with in the international economic arena. If instead the MAI's demise was due to internal problems within the talks themselves, or to a failure of the business community to recognize its own stake in these negotiations and to act accordingly, the NGOs' perceived increased clout is based on a false premise.

Furthermore, if the MAI failed primarily because consensus on certain key issues was irretrievably beyond the negotiating parties' reach, that is something that any future negotiations on multilateral rules on investment must take into account, for the same difficulties are sure to reappear. If, on the other hand, the MAI failed primarily because the NGOs were able to make their weight felt, the implications for the future agenda are quite different.

Alas, when all is said and done, a definitive determination of the counterfactual—of whether, without the NGOs' active opposition, the MAI might have been salvageable—is probably impossible. True, the internal differences among the negotiating parties ran very deep, but profound differences have marked other multilateral negotiations (including the Uruguay Round) and yet were ultimately resolved. Thus, one might compare the MAI in its last few months to a ship that is taking on water and is in distress but has not yet foundered. The NGOs' torpedoes, in this analogy, sealed the ship's doom, but one will likely never know whether, were it not for the torpedoes, the ship might have eventually reached a safe harbor. Although it is not easy to provide a definitive explanation of why the MAI negotiations failed, it nonetheless is worthwhile to explore some of the factors behind the failure. What is argued here is that the preponderance of the evidence supports the case that the negotiations were indeed in very deep difficulty before the metaphorical torpedo was fired by the NGOs and that this torpedo thus was more a coup de grâce than a fatal blow in its own right. The "deep difficulty" arose from both internal problems among the negotiating parties, including a fundamental flaw in the way the negotiations were structured and lack of full support from the

very constituency that they were intended to benefit, notably the business community.

What were some of the internal factors that contributed to sinking the MAI? Perhaps an important one is the fact that, to a very large extent, the impetus for the negotiations came not from the top leadership of the participating governments, but rather from their permanent bureaucracies. Most of the persons involved in the preparations for the talks were fairly junior and lacked experience with multilateral negotiations. Many were investment specialists in various ministries, with some experience in negotiating bilateral investment treaties or in working with the OECD Committee on International Investment and Multinational Enterprise. Often these specialists did not have easy access to higher-level officials inside their own governments.

By contrast, the impetus for most other multilateral economic negotiations of significance during the post-World War II era has come from the top political leaders of the countries involved. Indeed, in recent years the main impetus to multilateral trade negotiations has most often come from the political leaders of the United States. For example, both the Uruguay Round and the negotiations toward the North American Free Trade Agreement (NAFTA) were initiated under strong US leadership that derived ultimately from the commitment of the US president then in office. Well before the 1985 meeting of trade ministers that launched the Uruguay Round, President Ronald Reagan had consistently stated (including in his State of the Union addresses before Congress) that entering into such negotiations was a US priority. His successor George Bush did much the same in promoting NAFTA. Joining in this commitment were the political leaders of other countries, especially the European countries in the case of the Uruguay Round and Mexico in the case of NAFTA. The permanent professional staffs of their bureaucracies certainly played a major role both in defining the issues to be covered, and later in conducting the actual negotiations. But these bureaucrats operated under a mandate that came from the highest political levels of government.

In the case of the MAI, however, the political leaders of most participating countries played little if any part in launching the negotiations and gave them at most a somewhat distant blessing once they had begun. It is not clear that President Bill Clinton, for example, actively participated in the preparation for these negotiations.

This lack of commitment and participation on the part of top political leaders may have been critical to the outcome of the MAI negotiations. Their lack of involvement meant that, once it became apparent that issues were being raised over which the negotiating parties were in deep disagreement, the negotiators were unable to pass these issues upstairs to be resolved at the political level. Yet at the same time, no one at the negotiating table had authority to change the position of the government that he or she represented.

The fact that the MAI negotiations were conducted in relative obscurity by relatively low level bureaucrats led to another nagging problem: it laid the process open to the accusation that the negotiations were being held in secret. This charge was never quite true, as this chapter will document. The negotiations were indeed conducted out of the spotlight, but they were not held in the dark. It is also true that details of official negotiations are seldom made public (strategic leaks by one side or the other notwithstanding) until after the disagreements have been resolved, for the obvious reason that the publicity itself could hamper resolution. Nevertheless, the label of secrecy was one that the MAI's opponents made stick.

Much the same line of argumentation—that serious conflicts among governments can only be worked out at the highest levels—might be made about working-level officials involved in other negotiations that ultimately succeeded. For example, it is common practice to require official negotiators to advocate and hold to their government's preestablished position; they are not empowered to change that position. Where the positions of the various parties are reconcilable, these officials may be able on their own to achieve an outcome acceptable to all. But in any negotiation it may turn out that the parties' initial positions are not reconcilable. In both the Uruguay Round and the NAFTA negotiations, major disagreements led at some point to negotiating deadlock. Indeed, the Uruguay Round nearly foundered on several occasions because of such deadlocks, for example over agriculture. But in all these cases the deadlock was eventually broken by top political leaders determined to achieve the overall negotiating objective. Breaking the impasses required compromises whereby some of the negotiating parties had to change their positions, something that could be accomplished only at the highest political levels. By contrast, in the case of the MAI, when major disagreements became apparent, negotiators were unable to take the disputes upstairs for possible resolution. The top leaders simply were not engaged in the process.

The appearance of secrecy was also a consequence of the MAI being initiated at the bureaucratic rather than the political level. The discussions among government officials that led to the decision to start the negotiations were not publicly reported, as any decision made at the top surely would have been. Indeed, in the United States, where processes exist by which constituencies having an interest in multilateral economic issues can let their views be known to US negotiators (e.g., through the Advisory Committee on Trade Policy Negotiations of the US Trade Representative), few such constituencies even knew that the MAI negotiations were in the offing. Thus, when the launch of the negotiations was announced at the 1995 OECD ministerial meeting, there had been no public debate in the United States (or anywhere else) on the merits of entering into such an agreement. In contrast, for several years before the formal launch of the Uruguay Round in 1985, the pros and cons of a new round of trade talks were presented and debated at conferences and meetings throughout the

United States and other countries. Input was received from constituencies that would be affected by any agreement reached in the round, and in the end some of these constituencies (especially the US business community) were instrumental in ensuring that the US Congress ratified the final agreement.

Even the US business community was little informed of the negotiations at the OECD. One consequence was that this community subsequently did relatively little to support the effort. From the beginning, therefore, the MAI negotiations took place without the strong backing even of the constituency that presumably had the most to gain from their successful conclusion. In contrast, as detailed later in this chapter, by the time the negotiations had produced a draft text, constituencies opposed to the MAI had coalesced and organized themselves into a formidable force.

Perhaps an even more important contrast between the MAI and earlier negotiations is in the role played by the US Congress. In both the Uruguay Round and NAFTA, key members of Congress were involved in the decision by the US government to seek negotiations as well as in the negotiations themselves (from the sidelines, of course). This is of special importance because, under the US Constitution, the Congress, and not the executive branch, is ultimately in charge of policy pertaining to foreign commerce.

Although neither members of Congress nor their staffs negotiate international trade agreements on behalf of the US government, Congress must ratify the outcome of any such negotiation before it becomes binding. Since the early 1930s, Congress has delegated the negotiating function to the executive branch under various laws, but always on the condition that any change in US law necessitated by a new agreement be voted on by the Congress. Under the fast-track procedures whereby trade-negotiating authority was delegated to the executive branch during both the Uruguay Round and the earlier Tokyo Round of multilateral trade negotiations, key members of Congress were informed and consulted about the negotiations as they progressed.[1] Similar procedures were followed with respect to the NAFTA negotiations.

By contrast, officials in the executive branch established no process for consultation with Congress on the desirability of MAI negotiations before the negotiations got under way. Indeed, Congress was not even informed on the matter prior to the OECD ministerial declaration of 1995 (and even then, members of Congress or their staffs would have had to read the declaration itself to know that negotiations were about to begin). A number of legislators first learned of the negotiations from NGOs or other constituencies staunchly opposed to the MAI, and this tactical blunder was to haunt the US negotiators in the years that followed.

1. See Destler (1997a) for a description and analysis of the interactions between the executive branch and Congress during the negotiation of the Uruguay Round.

Although the muteness of the US Executive Branch (and of other OECD governments) led to charges of secrecy, these charges were not completely well founded. Certain nongovernmental advisory groups to the OECD were apprised of the discussions being held within the organization that led to the launch of the negotiations, and these groups continued to be kept well informed during the negotiations themselves. One of these groups, the Business-Industry Advisory Committee, represented business interests, and another, the Trade Union Advisory Committee, represented labor. Thus, although members of the US Congress were not directly informed through official channels about the start of negotiations, their relevant major constituencies, the US business and labor communities, were informed, at least in principle.[2] (Whether the two groups themselves were effective in informing their own memberships is another matter.) Also, the OECD Secretariat occasionally released statements regarding the MAI negotiations once they were under way. Thus, although the actual negotiating sessions were closed to the public (as are most intergovernmental meetings), they certainly were not held in secret. Rather, they simply remained rather obscure, or at least were so at the outset.

How did the negotiations come about at all? We turn to this issue next.

The MAI Is Conceived

Formal authorization to begin negotiating the MAI within the auspices of the OECD was provided, as already noted, by the OECD ministerial declaration of May 1995. Part of the background to this event, however, was the OECD's failure, four years earlier, to achieve a much less ambitious agreement pertaining to investment. This earlier effort would have created a binding National Treatment Instrument (NTI) that would have obliged each OECD member government to grant national treatment to the investors and investments of any other OECD country.[3] (A nonbinding version of this instrument was already in place.) The NTI negotiations were the responsibility of the OECD Committee on International Investment and Multinational Enterprise (CIIME), which meets on a regular basis. The US delegation to this committee is chaired by a deputy assistant secretary of state; in addition to this and other State Department officials, members of the professional staffs of the US Treasury and Commerce Departments often attend CIIME meetings.

The failure of the NTI talks resulted, in part at least, from an insistence by some European governments that a binding instrument cover law and

2. "We may not have told you, but we did tell your constituents" is not likely to be seen by congressmen as a defense—rather the opposite.

3. As noted in chapter 1, under a national treatment standard, a government must grant, in its laws and policies, treatment to foreign investors that is no less favorable than that granted to equivalent domestic investors. Chapter 3 provides a more detailed description.

policy at the level of subnational (provincial, state, and local) governments as well as that of national governments. The US representatives to the CIIME balked at this, because any agreement binding state governments would require legislation by Congress. The US delegation also anticipated that members of Congress would view such a binding of the states as a concession to the other governments at the table and would demand offsetting concessions from those governments. A more comprehensive agreement that included concessions that furthered US interests might be more palatable to Congress. In particular, the NTI would have granted national treatment to foreign investments on only a postestablishment basis, thus permitting certain countries to continue to screen (and perhaps block) new investment.[4] US officials believed that an instrument that granted, inter alia, preestablishment national treatment to foreign investors would be seen by Congress as in US interests.

Another factor that figured in the failure of the NTI talks was the insistence of some OECD countries that the agreement not cover "cultural" industries. This term loosely encompasses a group of activities that includes the publishing and motion picture industries and others whose output is regarded as an expression of national or regional culture. This complex issue was to surface again during the MAI negotiations themselves and is discussed later in this chapter.

Following the failure of the NTI discussions, the CIIME held a series of meetings to explore what might be a feasible and desirable agenda for the OECD (or other multilateral institutions) in the area of international investment. In the course of these meetings, European governments indicated a willingness to negotiate what was initially termed a "wider investment instrument," meaning one that went beyond the provisions of the NTI. Investors, mostly multinational firms, from a number of European countries had come to hold significant investments in the United States. Hence the immediate interest of most of these countries was to enter into an agreement with the United States that would grant national treatment at the state as well as the national level to these investments. However, during the discussions that ensued, officials from the US government agreed with their counterparts from individual European countries that the negotiations could usefully be extended to cover still other issues. Thus a consensus was reached to include, as issues for negotiation, such items as enterprise-to-state dispute settlement procedures, provisions for investor protection, limits on state interventions in the form of performance requirements and investment incentives going beyond existing disciplines in the WTO rules, and a number of other issues.

4. In fact, only two OECD nations, Canada and France, then had laws in place that allowed their governments to screen inward foreign investment. In practice, neither country used this authority routinely. Moreover, the United States itself had in place a law (the 1988 Exon-Florio amendment) that allowed the federal government to block acquisitions of US firms by foreign investors if it found that the acquisition would adversely affect national security.

How could the OECD expect to succeed in negotiating a wide investment agreement when it had just failed to conclude a narrow one encompassing some of the same issues? The reasoning of the CIIME, and of the US delegation to the CIIME, was that a wide instrument would have more to offer a broad range of constituencies than would a narrow one. Some of these constituencies might be willing to accept some provisions that they did not like in order to gain other provisions, in areas beyond the original scope of the talks, that they did like. This approach—of conducting negotiations across a broad range of issues so as to give each of a range of different constituencies something they liked—has in fact characterized all the major rounds of multilateral trade negotiations during the post-World War II era. But such an approach involves a considerable amount of give-and-take, and it implies that each negotiating party actually is empowered to "give." This in turn requires the engagement of the highest political officials, including those in the legislature. Thus, right from their inception, the MAI talks suffered from a potentially fatal flaw: their success would likely depend on a willingness to trade concessions across different domains, but the negotiators had no power to make such broad concessions and lacked access to more senior officials who did.

Some of the issues to be taken up in the wider investment instrument were in fact already covered in existing OECD instruments. In addition to the nonbinding NTI, there existed an OECD Code of Liberalization of Current Invisible Transactions[5] and a Code of Liberalization of Capital Movements. The feeling in the CIIME was that the new instrument would serve to modernize these existing instruments and perhaps to supersede them.

The preliminary discussions within the CIIME over the wider investment instrument took place over a period of about three years. Serious disagreements over some issues persisted (e.g., over the proposed exception for cultural industries) and, in fact, nearly derailed the consensus to begin the actual negotiations. Another disagreement that emerged was over whether the negotiations should take place at the OECD or in some other venue; this issue is discussed below. Despite these unresolved disagreements, some governments wanted to announce the onset of negotiations at the OECD ministerial meeting of 1994. However, lack of a full consensus forced a delay until the meeting of 1995.

When consensus was finally reached, it was agreed that "wider investment instrument" was not a proper sounding name for the anticipated end product of the talks. Thus the new, more ambitious agreement was at first dubbed the "Multilateral Investment Agreement." This name was hastily changed, however, at the request of the US government when wags pointed out that it abbreviated to MIA, commonly read within the

5. These are the nontrade components of the current account and consist mostly of interest payments and earnings on direct investment.

United States as "missing in action." Alas, as noted in chapter 1, the new name, "Multilateral Agreement on Investment," when written in French, would be abbreviated as AMI, the French word for "friend." (And in Italian, prophetically enough, "mai" means "never.") Later the opponents of the MAI in French-speaking countries would have a field day with this acronym, proclaiming that "With a 'friend' like this, you don't need any enemies." Perhaps a multilingual specialist in anagrams should have been consulted.

The 1995 OECD ministerial declaration (OECD 1995) specifically called for the following:

> The immediate start of negotiations . . . aimed at reaching a Multilateral Agreement on Investment by the Ministerial Meeting of 1997, which would:
> - provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection with effective dispute settlement procedures; [and]
> - be a free-standing international treaty open to all OECD Members and the European Communities, and to accession by non-OECD Member countries, which will be consulted as the negotiations progress.

These two negotiating guidelines reflected some differences in opinion with respect to the choice of the OECD as negotiating venue, as noted earlier. Officials of some OECD countries (and, especially, the Commission of the European Communities) had, in the preliminary discussions, indicated a preference for the World Trade Organization (WTO) over the OECD as the negotiating venue.

This preference was based on two grounds. First, some of the substantive issues that the MAI negotiations might cover intersected with the coverage of existing WTO instruments, especially the Agreement on Trade-Related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS).[6] Second, the WTO's membership is much broader than that of the OECD. A number of countries in which international investment figures importantly are not OECD members but are WTO members (or, in some cases, candidates for WTO membership). Thus an agreement struck in the WTO would apply to more countries, including some to which such an agreement would be highly relevant, than an agreement struck in the OECD.

This second matter, however, was seen to cut in two directions. On one hand, it was seen as desirable to include as many countries as possible in the negotiations. On the other hand, it was believed that, within the WTO membership, some countries were unprepared to commit to the obligations envisaged under the MAI and might seek to block progress toward any agreement that imposed stringent standards on governments. This

6. Graham (1996) discusses in detail the issue of the negotiating venue for a multilateral agreement on investment and concludes that the WTO would be the optimal venue. On the overlap between MAI issues and existing WTO instruments see Sauvé (1997).

belief was perhaps most strongly held by officials of the US government (perhaps wrongly so; see chapter 5). At least some US business constituencies that backed the idea of an investment agreement shared this view.

Thus the US government and most other OECD governments felt that the way to a successful negotiation of a worldwide "high standards" agreement would be to first secure agreement among the like-minded nations of the OECD. Only after this had been accomplished would participation be offered to any other country willing to accept these standards. The clear expectation was that such an agreement would be relatively easy to achieve, and the negotiators' deadline reflected this expectation: the finished product was to be presented for approval at the OECD ministerial meeting scheduled for May 1997, only two years after the ministerial declaration launching the talks. Because the first full meeting of the negotiating group was not scheduled until September 1995, almost four months after the declaration was issued, the negotiating parties had only about 20 months to negotiate and conclude a major multilateral agreement.

The issue of venue in fact did not disappear even after the 1995 ministerial declaration. The European Commission continued to press for investment-related work to begin within the WTO, although it stressed that this work would be of an informal nature rather than a formal negotiation. However, following the January 1996 meeting of the MAI negotiating group at the OECD, the European members of the organization reaffirmed their commitment to the MAI process as the primary means by which a multilateral investment agreement would be achieved.

Even so, behind this commitment lay a certain amount of internal discord within Europe as well as dissension between the European Union and the United States. The European Commission, which does not have full authority over investment issues in the European Union, had in fact sought authority from its member countries to pursue a larger effort within the WTO, where the Commission, rather than the EU member governments, would sit at the negotiating table.[7] It was in the wake of these efforts by the Commission that the US government called upon the European national governments to reaffirm their commitment to the OECD negotiations.

In the end, a rather shaky consensus was reached between the European Union and the United States that the only mandate for actual negotiation on investment would reside in the OECD. However, it was also agreed that a WTO working group could be constituted that would, on a largely informal basis, lay the groundwork for future activity in the investment area in the WTO. Thus, at the December 1996 ministerial meeting of the WTO, a working group on trade and investment was established within

7. Although at the WTO the Commission leads the negotiations on behalf of the EU member countries, representatives of all the EU countries also monitor the proceedings.

the WTO. Subsequently, however, the work of the WTO group was effectively put on ice pending the outcome of the OECD negotiations.[8]

The first sign that the MAI was in serious trouble came at the OECD ministerial meeting of 1997, where it was announced that the MAI had not been completed on time and that a one-year extension was being granted. The ministerial declaration implied that the reason for the delay was that technical details of the agreement remained unfinished. There was no hint of major disagreement among the negotiating parties. But, in fact, time was being bought to resolve, if possible, some deep differences that had emerged.

Deep Internal Difficulties Emerge

The failure to complete the MAI negotiations by May 1997 was, of course, not due to technical details. During the negotiating sessions, major disagreements had emerged. As already noted, the negotiators could not resolve these disagreements on their own authority but lacked a mechanism by which to force these decisions to a higher political level. A more fundamental problem was that, with or without this mechanism, each of the major negotiating parties seems to have approached the exercise solely as a means to get other countries to give up laws or policies that discriminated against its own investors. In other words, if any large negotiation is a matter of give-and-take, the MAI negotiating parties seemed, almost from the beginning, prepared only to take, and to give nothing of substance in return. Each party took the position that its own policies and practices were either trivial in their discriminatory effect or justified on grounds that could not be altered. In other words, each party behaved as though an agreement could be struck that would leave its own policies and practices largely unaltered, if only the other parties could be made to see the errors of their demands or the need to change their own policies.

Even this would not have been a problem had all parties accepted that the relevant laws, policies, and practices of all other parties were in fact already consistent with the standards to be set by the new agreement. In that event, the MAI would have been nothing more than an exercise in codifying this existing law, policy, and practice, but at least such an agreement could serve as a starting point for real liberalization. To a great extent, the negotiating parties were willing to accept this outcome. They were prepared to negotiate an MAI that might have contained strong

8. However, speaking before the European Parliament following the withdrawal of France from the MAI negotiations in October 1998, EU Trade Commissioner Sir Leon Brittan noted that "I have always taken the view that the WTO is the best long-term home for this work for which the MAI has already provided valuable signposts." Sir Leon's perspective on this matter is of note because he is perhaps the highest-level official to have been actively and continuously involved in consideration of the issues surrounding the MAI.

obligations, but ones that were subject to such long lists of exceptions that nothing would really change (see chapter 3). It quickly became clear, however, that not all parties indeed did accept that nothing in the law, policy, and practice of other parties needed to change. Although the status quo was acceptable as a matter of consensus for most aspects of law and policy, on a subset of issues there were demands for change.

Nowhere was the perception stronger that the MAI could be achieved with little significant change in domestic law or policy than in the US delegation. Coming into the negotiations, the US negotiators apparently felt secure that US federal policies toward foreign investment were sufficiently liberal and nondiscriminatory that no other OECD members would see the need for significant change. The only major concession they believed they might have to make was to bind the US states to the national treatment and other provisions of the MAI. The US negotiators would quickly learn, however, that this was simply not the case. But as previously indicated, they were little prepared (and in fact unable) to negotiate anything that would require a change of US law or policy.[9]

The US negotiating position was also shaped by US experience in the negotiation of bilateral investment treaties (which had also shaped the US position in negotiating the investment chapter of NAFTA). In these treaties, the United States had demanded that US investors and their investments be given not simply nondiscriminatory treatment, but treatment that was "no less favorable" than that granted either to domestic investors or to foreign investors from other countries in similar circumstances. In practice, this amounted in some cases to treatment better than that accorded to domestic investors. Although such demands might make some sense in the context of a bilateral treaty with a country that pursued policies hostile to any type of private investment, they did not make sense in the context of a multilateral treaty. (A *reductio ad absurdum* outcome might be that investors everywhere would set up foreign subsidiaries to invest in their home countries, in order to receive the more favorable treatment accorded to foreign than to domestic investors.)[10] Arguably, the quest by the United States for language that might force a country to give foreign in-

9. There were a few relatively minor areas where US negotiators felt that the United States might be able to offer some liberalization of its policy. For example, it was hoped that Congress might be willing to repeal section 310(b) of the Communications Act of 1934 that effectively limited entry of foreign telecommunications services providers into the US market. But in the major piece of telecommunications legislation passed during the negotiations—the Telecommunications Act of 1996—Congress failed to do so. (Sidak 1997 provides comprehensive analyses of both laws and how they relate to foreign investment in US telecommunications.) Likewise, there was some hope that the United States might be able to offer some liberalization of restrictions on foreign participation in US research and development consortia.

10. There are cases where this has actually happened. For example, during the early and mid-1990s a number of Chinese firms—and even some state-owned enterprises—established subsidiaries in Hong Kong to invest in the mainland, to take advantage of preferences granted in the mainland to foreign investors.

vestors preferential treatment over domestic investors led to the MAI's language on expropriation that aroused the wrath of the environmental NGOs, as discussed below.

For their part, the European delegations also sought changes in US policy. An early example came in the area of taxation. In August 1995 the European-American Chamber of Commerce issued a report claiming that EU-owned firms operating in the United States faced more stringent auditing by US tax authorities than did US-owned firms in the same industries.[11] Had this been proved true, it could be argued that European-owned firms were receiving treatment less favorable than that accorded to their US-owned counterparts, contrary to the principle of national treatment. In one survey, 42 percent of European-owned firms indicated that US federal tax policies treated them differently from US-owned firms—this was a minority of respondents, to be sure, but an uncomfortably large one. The European Commission subsequently pushed for the inclusion of tax issues in the MAI, and at the meetings of the MAI negotiating group on 25-26 January 1996, an expert group was created to determine what tax-related issues should be included in the prospective agreement. However, a US government spokesperson indicated shortly thereafter that the United States "tends to be skeptical" about this issue, because it believes that tax treaties negotiated under OECD standards have worked well.[12] In the end, the MAI draft text contained very little relating to tax issues (see chapter 3).[13]

Allegedly discriminatory tax treatment of foreign-owned firms by the United States was, however, soon to become a relatively minor issue. On

11. See "Study Says EU-Owned Firms Face Tougher Tax Reviews in US," *Inside US Trade,* 25 August 1995. As the article noted, the assertion that foreign-owned companies faced tougher auditing by the Internal Revenue Service than domestically owned firms appears to be supported by a report to the Senate Finance Committee by the US General Accounting Office (GAO). The GAO found that, between 1990 and 1993, audits of foreign-owned firms increased 353 percent, whereas audits of domestically owned firms *decreased* 31 percent. This change in auditing practices came in the wake of accusations that foreign-owned firms in the United States had been avoiding US taxation through transfer price manipulation and other means; low tax payments by these firms in fact had been an issue in the 1992 US presidential campaign. For details, see Graham and Krugman (1995).

12. "OECD Investment Negotiators Form Group to Examine Tax Issues," *Inside US Trade,* 2 February 1986.

13. Intra-European differences also came into play on the tax issue. The European Commission has long sought greater authority over tax policy, with the ultimate objective of harmonizing tax policy within the European Union, something resisted by a number of EU member states. The Commission, according to officials interviewed by this author, saw the MAI negotiations as one means to advance this agenda. Some European countries were willing, in effect, to side with the United States to keep taxation largely out of the MAI. However, their willingness was not for substantive reasons—these countries were just as concerned about discriminatory US tax audits as was the Commission—rather they did not want to grant any additional authority to the Commission in this area, even implicitly.

12 March 1996, President Clinton signed into law the Cuban Liberty and Democratic Solidarity (Libertad) Act, better known as the Helms-Burton Act. Among other things, this law was designed to enable US nationals with claims to property expropriated by Cuba to bring suit in US courts against parties (including non-US-owned corporations) who "traffic" in such property. The law, intended to benefit the Cuban-American community, applied to any person of US nationality at the time the law entered into force, even if the expropriation had occurred before that person became a US national. Such a retroactive definition of expropriation is contrary to normal international standards. Normally, for such a seizure to be considered an expropriation under international law, the person who owns the seized property must be a national of a country other than the one whose government carries out the seizure, at the time the seizure takes place. The Helms-Burton law also allowed the denial of visas or entry into the United States of non-US persons (and their spouses and children) who traffic in such property.

The Clinton administration had opposed these provisions in the Helms-Burton Act until the Cuban government shot down an airplane registered in the United States from which Cuban-Americans based in Miami were distributing anti-Castro leaflets. The president signed the law, according to a statement issued to the OECD negotiating group by the US delegation, because he "recognized the need to take strong measures [after the airplane had been shot down]." The statement also noted that "the Government of Cuba's illegal shooting down of the aircraft greatly increased the bipartisan sentiment on Congress to pass this tough legislation."[14]

Mitigating somewhat the impact of the law was a provision that allowed the president to suspend the ability of US nationals to pursue lawsuits under the law. This the president did immediately upon the law's enactment. Also, the Secretary of State could waive the visa and entry restrictions for any of a number of reasons.

Reaction to the Helms-Burton Act was nonetheless rapid and severe. Already at a meeting of the MAI negotiating group on 14 March 1996—two days after President Clinton signed the measure into law—concerns were expressed about the law's compatibility with the proposed obligations the United States would undertake by signing the MAI. At this meeting the Canadian delegation announced that it would, at future meetings, introduce proposals to limit the extraterritorial application of national laws and to discipline "secondary boycotts." These proposals were clearly aimed at Helms-Burton. In addition, Canada suggested that it would propose disciplines to narrow the use of national security exemptions that might appear in the final MAI and to make any use of these exemptions subject to the agreement's dispute settlement procedures.

14. The text of the statement is reproduced in *Inside US Trade,* 26 March 1996.

Other national delegations expressed discomfiture with the Helms-Burton Act, leading the US delegation to issue its explanatory statement.

In fact, Canada's position on Helms-Burton reflected long-standing hostility on its part and that of other OECD countries to the propensity of the United States to assert extraterritorial jurisdiction with respect to its own law and policy. Almost all foreign countries, including such close allies of the United States as the United Kingdom, have objected to these assertions. These objections have often been voiced even when the affected countries were sympathetic to American objectives. The same was true in the case of Helms-Burton: citizens of a number of OECD countries have been victims of similar expropriations. The means of attaining the objective, however, were seen in this case as entirely objectionable.

Passage of the Helms-Burton Act placed a large cloud over the MAI negotiations that, according to some negotiators interviewed by this author, never fully dissipated. One very senior official from a European country, who played a major role in the negotiations, spoke to this author about Helms-Burton on condition of anonymity. According to this official, many delegations felt that the law was highly contrary to the spirit of the MAI, and that if the law were to stand as an accepted exception to MAI obligations, the agreement would be shown to be effectively toothless.[15] Sentiment against Helms-Burton was heightened by the fact that it had been passed by the United States—the same country that had led the early efforts to negotiate the MAI. Also, the United States had insisted upon the OECD as the negotiating venue because it was felt that an OECD negotiation promised an outcome embodying the highest possible standards. Helms-Burton seemed to many countries to fall far short of those standards.

Most delegations, according to this official, thus agreed with the position that the Canadian government took against the United States. In their view, the United States, "the leading proponent for an investment agreement with the highest possible standards, has taken actions, and has incorporated into its law further measures that strike at the very core of these negotiations."[16] The feeling was strong that, by insisting that the MAI would have to adapt to US law rather than the other way around, the United States was behaving hypocritically, because Helms-Burton was seen as highly discriminatory.

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15. At the same time, this official acknowledged that Helms-Burton struck at a very real problem, namely, what to do when property that had been expropriated without compensation or due process of law was offered for sale to international investors. The objection to Helms-Burton was not that it addressed this problem, but rather that it did so in a manner that was unilateral and, in the eyes of non-Americans, discriminatory. For example, a US national, acting under the law, could sue a European company that bought property in Cuba that had been expropriated from that American. However, a European could not, under this law, sue an American who had bought property expropriated from the European in, say, one of the former Soviet bloc countries.

16. Quoted in *Inside US Trade*, 15 March 1996.

Acrimony between the United States and other OECD nations over Helms-Burton only increased in the months following the law's passage, culminating in a threat by the European Union to file a complaint that the law was inconsistent with US obligations under the agreements of the WTO. During the summer of 1996, US Under Secretary of Commerce Stuart Eizenstat was named Special Representative for the Promotion of Democracy in Cuba to try to work out the difficulties created between the United States and other countries by the provisions of Helms-Burton. In November of that year, over US objections, the WTO established a panel to hear the European Union's complaint against the United States. There followed an exchange of rather unusually strong language between the US government and the European Commission. Under Secretary Eizenstat expressed concerns that pursuit of the WTO case "should this result in a WTO panel attempting to define what are US national security interests—would strengthen the hand of those members of Congress who questioned whether the United States should even be a WTO member." EU Commissioner in charge of international trade Sir Leon Brittan responded that "it must not be possible for one country to evade [the WTO dispute procedures] simply by proclaiming that its national security is involved, however far-fetched such a claim might be."[17]

Subsequently, however, after the US government expressed a willingness to enter into direct talks with the European Commission on Helms-Burton, the European Union agreed to suspend its WTO complaint. On 11 April 1997, the Commission and the US government jointly announced an agreement whereby they would negotiate disciplines to deter EU investment in properties expropriated by the Cuban government. These negotiations were to be concluded by 15 October 1997. The European Union also expressed the hope that the disciplines thus worked out would be incorporated into the MAI. The October deadline was not met, however, largely because it became clear that a possible compromise between the two parties would not be accepted by key members of the US Congress.

Nonetheless, talks between the US government and the European Commission continued into 1998, during which time a number of proposals to resolve their differences failed to gain support from one side or the other. Meanwhile a new item was added to the agenda, namely, resolution of US-EU differences resulting from passage by Congress of the Iran-Libya Sanctions Act. That act called for sanctions against foreign companies that invest in the oil and gas industries of those two countries. Although the issues had not been fully resolved at the time of this writing, the European Union did allow its WTO case to expire, and in the meantime the United States continued to suspend enforcement of the relevant provisions of the Helms-Burton law. An understanding seemed to prevail that, if enforcement of these provisions were attempted, the European Union would reopen the WTO case.

17. Quoted in *Inside US Trade,* 14 February 1997.

Even as the European Union was expressing its outrage over what it felt was a major US violation of the spirit of the MAI, it was simultaneously defending what the United States saw as an unacceptable exception to the MAI. This was a blanket "carve-out" of regional economic integration organizations (REIOs) from the most-favored-nation (MFN) obligation proposed by the European Union. This carve-out would allow member states of REIOs (of which the European Union was one) to, in principle, grant more favorable treatment to each others' investors than to investors from nonmember signatories of the MAI. The US position—joined by a number of other non-EU governments—was that specific exemptions from MFN treatment might be permitted as listed exceptions but that a blanket carve-out was not acceptable. The least acceptable portion of this proposed general exemption was a provision that would allowed REIOs in the future to implement additional preferential policies toward each others' investors beyond those existing when the treaty is signed.

Underlying US concerns over the REIO carve-out was a fear by US officials that it implied a change in the internal policy of the European Union. Historically, consistent with Article 58 of the original Treaty of Rome, an affiliate of a foreign firm was treated as an EU firm if that affiliate was incorporated in an EU country. (In other words, such an affiliate was granted national treatment.) Thus the United States feared that the REIO carve-out in fact implied a major deliberalization of European policy toward foreign investment. In this regard, the US concern over the REIO carve-out was not much different from the European concern with Helms-Burton: in both cases, one side feared a major change in the other's law and policy in the direction of greater discrimination against foreign investors or their investments.

The issue of an MFN carve-out for REIOs had not been resolved at the time the MAI negotiations broke down. However, according to negotiators from both the United States and the European national governments, on this issue the two sides at least understood each other's point of view. These negotiators felt that a mutually satisfactory compromise would likely have been reached eventually, had the negotiations continued.[18]

A second issue on which the United States objected to proposals of certain other countries was that of a general exception for cultural industries. As already noted, this issue had emerged in the pre-MAI effort to negotiate a binding NTI and was an issue with a long and emotional history in multilateral trade negotiations. The governments of Canada and France sought a general exception for cultural industries from national treatment and other MAI obligations. They argued that the exception was necessary

18. This statement is based on interviews conducted by the author with officials of the US government and two European governments. The officials spoke on condition of anonymity. It is not clear exactly what the compromise might have been, but it almost surely would have preserved Article 58 of the original Treaty of Rome as this article has been interpreted throughout the existence of the European Union and its predecessor organizations.

to maintain national cultural autonomy in an era when the forces of globalization threatened to erase cultural expressions indigenous to a country or region. The position of the US government was that the exception was sought not so much for such lofty reasons as for the purpose of discriminating against foreign investors in these industries. In particular, the United States was concerned that the exception would allow governments to continue to favor certain local firms involved in magazine publishing, television broadcasting, and motion picture production.

The US government did indicate that it would accept exceptions for specified cultural activities from national treatment obligations as part of country-specific reservations to be lodged by all MAI signatory parties (see chapter 3). This was not acceptable to France, however, because specific reservations would not allow the introduction of new nonconforming measures in the future if these were deemed necessary to continue to protect French production of television programs and movies.[19]

Thus the dispute boiled down to whether cultural industries would be accorded a general exception in the MAI or would be subject to country-specific exceptions. On this the US position was that a general exception was unwarranted, difficult to execute, and easy to abuse (how, precisely, does one define a "cultural" industry?). The French, joined by Canada, countered that culture is too important to be relegated to a country-specific exception.

Closely related to the issue of cultural industries were issues pertaining to the protection of intellectual property rights (IPRs).[20] Under the MAI, intellectual property, when registered in a country where the rights holder is not a citizen of the country, would be treated as investment. Hence, within that country, the intellectual property in question would benefit from national treatment, most-favored-nation status, and similar national obligations under the agreement. However, in many countries, exceptions to national treatment and most-favored-nation treatment do exist with respect to IPRs, and these posed problems for the MAI.[21] For instance, in Europe there exist schemes by which fees are collected on the sale of blank video and audio tape, which are then used to compensate copyright holders for the private copying of their materials. The payments are administered through copyright collectives that enjoy, in effect, monopoly status in terms of the right to receive and distribute the proceeds from the collection of the fees. These schemes, however, fail to accord national treatment to foreign copyright holders. The fees are used to compensate national cre-

19. France has a long history of aversion to US movies. See Grantham (1998).

20. On this issue see Gervais and Nicholas-Gervais (1999).

21. These exceptions are nonetheless consistent with other international agreements pertaining to intellectual property protection, such as the Berne and Paris Conventions (on patents and copyrights, respectively) and the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights.

ators of artistic works disproportionately,[22] and foreign copyright holders often are unrepresented in the governance of the collective, although their rights to their works might be administered by the collective.

Other governmental schemes extending financial support to creators of artistic products could also be, under the MAI as drafted, in violation of MAI obligations. In France, for example, the price of every movie ticket includes a fee that goes to finance French movie production. Under a strict standard of national treatment, fees collected on tickets for American-made films would have to be remitted to the American rights holders, something that certainly does not happen under the existing scheme. Similar arrangements exist in other European countries.

These issues could have been dealt with through IPR-specific derogations within the MAI, but this would have been tricky: a badly worded exception might open the way for claims for exceptions that were never intended. One factor that figured in this regard was that the MAI negotiators were not themselves experts in IPRs, and indeed, the implications of the draft MAI for existing IPR-related law and policy became apparent only after the draft was published.[23] At this point, in fact, on advice from IPR experts within their governments, the negotiators carved out of the draft agreement those obligations that might have created uncertainty with respect to existing obligations under the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPs) or the World Intellectual Property Organization.

The issue of a general exception for cultural industries was cited by French Prime Minister Lionel Jospin in his October 1998 statement announcing that France would withdraw from the MAI negotiations (see chapter 1). Indeed, the French copyright collective had by then joined with NGOs and other constituents in protesting the MAI. However, negotiators interviewed by this author have indicated that, at the time of the French withdrawal, a compromise was in the offing on this issue. But the details of this potential compromise have not been revealed.

The issues posed by Helms-Burton, REIOs, and cultural exceptions created major conflicts among the MAI negotiating parties that had not been resolved when the negotiations were terminated in late 1998. These three sets of issues were not, however, the only major disagreements that

22. National treatment, according to Gervais and Nicholas-Gervais (1999), would seem to require that the fees be distributed in proportion to the volume of sales generated by each copyholder. But existing schemes do not do this. The position of the European Commission is that the appropriate standard is not national treatment (or most-favored-nation status) but one based on reciprocity. Because no such scheme exists in the United States, reciprocity would seem to justify exactly no payments to American rights holders.

23. Some of these issues could have been avoided had the MAI's definition of an investment not been exceedingly broad. It is not entirely clear, for example, why intellectual property should be seen, for purposes of the MAI, as an investment and hence subject to MAI obligations, when IPRs are already covered under WTO rules.

the negotiations had revealed. For example, at the final formal meeting of the negotiating group in the spring of 1998, the issue of country-specific exceptions to the MAI had only begun to be considered. One matter still unresolved at that time was whether countries would actually negotiate these exceptions. Indeed, no process was agreed upon under which exceptions might actually be scheduled. One solution would have been for each country simply to list all the exceptions that existed in its current law and policy. That is, each country would determine what elements of its law and policy were inconsistent with obligations that would be created by the MAI and list these as exceptions. But this would naturally lead countries to comb through their laws exhaustively and to list any law or policy that might conceivably conflict with the new obligations. The resulting lists would have been very long. Thus, the alternative would be to have the parties actually negotiate these exceptions, with a view to rolling back the number and extent of nonconforming measures, and thus actually liberalize policy. Early on in the negotiations, it had become clear that major problem areas existed in services in particular. Indeed, most of these problems had turned up in the GATS negotiations in the WTO.

Some European countries in particular insisted that they would not liberalize their services sectors beyond what they had done in the context of WTO, in part because they feared a "free-rider" problem emerging. Because the GATS imposed most-favored-nation obligations, service-sector liberalization granted to OECD nations in the context of MAI would have had to be extended automatically to all GATS members, even those that offered no reciprocal liberalization. The EU nations (and, eventually, other nations as well) found this prospect unacceptable. On the other hand, one reason why business interests, and US business interests in particular, did not enthusiastically embrace the MAI negotiations is that they had originally anticipated that progress in removing sector-specific investment obstacles in the services sector would be more rapid in the MAI than in the WTO. When this expectation was dashed, business interest in the negotiations receded.

Another unresolved matter pertaining to country-specific exceptions was whether or not, once the MAI came into force, country-specific lists of exceptions would be subject to standstill. "Standstill" is negotiating jargon meaning that, once the list has been finalized and the MAI is in effect, no additional exceptions may be added. At the beginning of the negotiations, the US negotiators had indicated that, if no rollback of existing nonconforming measures could be agreed on, at least a standstill should be achieved. However, by the time the negotiations were terminated, the US government was close to reversing its position on this issue, indicating that future exceptions pertaining to labor and environmental issues could not be ruled out.

Thus, when the MAI negotiations were terminated, there were major outstanding differences among the negotiating parties, some of which ap-

peared close to irreconcilable. Were they of such magnitude as to cause a complete breakdown in the negotiating process? One cannot answer this question with certainty for the simple reason that the negotiations did not continue after May 1998. But for reasons discussed earlier, it is difficult to see how some of these differences might have been resolved, given the lack of high-level commitment to the goal of creating an MAI. In any case, the decision to terminate the negotiations was without question affected by "civil society" and, in particular, by the environmentally concerned NGOs.[24] We turn to this next.

The NGOs Enter the Stage

The history of NGO involvement in the world of multilateral commercial law, and in the negotiating processes by which this law is created, is very short. Indeed, before the 1990s, the world of the environmentally oriented NGOs and the world of international trade and investment agreements were essentially disjoint. They coexisted, but they did not touch or overlap to any significant degree.

That changed rather dramatically in 1991, when a dispute settlement panel of the General Agreement on Tariffs and Trade (GATT, the predecessor to the WTO) sided with the government of Mexico in a dispute with the United States. A provision of the Marine Mammal Protection Act of 1972 banned the importation of tuna from countries that did not require their fishermen to take steps to prevent the killing of marine mammals (mostly dolphins) in the catching of tuna. The United States had been enforcing this ban against Mexican fishermen. This enforcement in turn had come about when the Earth Island Institute, an environmentally oriented NGO, filed and won a lawsuit in a US federal court to force the Department of Commerce to enforce the law against Mexico. The GATT panel held that the US law violated GATT Article III on national treatment, and it threw out claims by the United States that the ban on tuna imports was consistent with GATT Article XX, parts b and c.[25] Environmentalists were outraged by the panel decision, which they saw as placing the goal of free

24. Included in this category would be those NGOs whose major mission is to protect and preserve wilderness areas, rare and endangered species, old-growth forests, and the like, as well as those primarily concerned with air and water pollution.

25. Article XX creates an allowable exception to Article III whereby a government can ban an import for health or safety reasons, or for a number of other reasons (including to prevent trade in products made from an endangered or protected species). The US reasoning was that the Mammal Protection Act established dolphins as a protected species. The GATT panel ruled that the US could in fact invoke Article XX to restrict imports made from dolphins (e.g., dolphin meat) but that tuna was not such a product. The fact that tuna fishing resulted in the deaths of dolphins was seen as beyond the reach of Article XX (a close call that was partially reversed in the later case on shrimp and turtles).

trade above that of saving the environment. But in fact the GATT decision did little to affect US policy. Rather, Mexico agreed to take steps to reduce the killing of marine mammals by its tuna fishermen. This agreement was reached during the course of negotiations toward the North American Free Trade Agreement (NAFTA).

This last matter notwithstanding, the tuna episode led some NGOs to become fervently involved in the debate over NAFTA. However, in both Canada and the United States, not all environmentally oriented NGOs were on the same side of this debate. Some supported NAFTA, arguing that the agreement would bring about higher incomes per capita in Mexico, which in turn would enable greater spending in that country on pollution abatement and other environmentally friendly investment. NAFTA supporters noted that Mexico already suffered from heavy pollution, and that some politically powerful groups in Mexico accorded a high priority to repairing the environmental damage already done, but that a general scarcity of resources was a major constraint on such action. NAFTA proponents also pointed out that one outcome of the negotiations was a joint commission that ultimately would have the authority to establish and enforce air quality standards in the Juarez-El Paso area. Other measures were being implemented under the agreement to deal with pollution elsewhere along the US-Mexico border.

Other environmental NGOs, however, took the position that, if NAFTA were passed, Mexico would become a haven for pollution-generating activities: firms would transfer operations there in order to avoid environmental laws and regulations in Canada and the United States. These groups pointed to the problems that existed along the US-Mexican border, arguing that efforts to correct these predated the NAFTA and had not been very effective. Some of the worst of the alleged environmental offenders were maquiladoras (product assembly operations near the border), most of which were owned ultimately by US-based firms.

In 1992, then-presidential candidate Bill Clinton took up the environmental side of NAFTA as a campaign issue, promising that, if elected, he would make it a priority to renegotiate NAFTA to make it more environmentally friendly. Following the election, his administration carried out this pledge by negotiating with Mexico and Canada an environmental sidebar to the agreement. The government of Mexico and, to a lesser degree, that of Canada resisted the sidebar. In Mexico there was sympathy for the notion that, with regard to certain border areas where environmental problems could be identified (for example, El Paso-Juarez, San Diego-Tijuana), a bilateral approach to solving these problems would be appropriate. Indeed, as already noted, efforts to deal with these problems were already in place. However, there was also considerable feeling in Mexico that NAFTA should not become a vehicle by which the United States forced its own views and approaches on the environment onto Mexico in cases where there was no issue of direct spillover into the United

States.[26] Thus, for example, Mexican authorities balked at the notion that NAFTA might be a vehicle by which air quality standards might be set for Mexico City.

In general, however, the environmental NGOs were unpersuaded by Mexico's arguments. They tended to see Mexico's desire for autonomy on internal environmental issues as a smokescreen for policies favoring pollution havens in the country. Most NGO spokespersons argued further that the substantive provisions of the environmental sidebar agreement were weak and its provisions for enforcement weaker still.

NGO opposition to NAFTA and, by extension, to the MAI stiffened substantially as a result of a dispute brought against the government of Canada by the Ethyl Corporation, a US firm, under the investor-to-state dispute settlement procedures of NAFTA chapter 11. This dispute and its outcome were in fact pivotal to NGO involvement in the MAI, and it is important to understand the dispute in some detail.

The dispute arose in response to a bill passed by the Canadian parliament in the spring of 1997. This bill effectively banned the use of the gasoline additive methylcyclopentadienyl manganese tricarbonyl (MMT) by prohibiting interprovincial trade of this substance.[27] The bill had been initiated by the Canadian environmental ministry, whose motivations were complex. First, the ministry sought to support Canadian manufacturers in the automotive industry, who believed that MMT could damage the ability of sensors in certain advanced automotive emission systems to function properly. The manufacturers sought to implement a North American standard for such systems, but this effort was impaired by the fact that MMT was generally not used as an additive in the United States; hence Canadian use might require redesign of these systems. Second, the ministry sought to protect the health of Canadians, because there was some evidence that MMT could pose a health risk when its by-products were released into the atmosphere. Third, the ministry sought to protect both producers and consumers from the added engineering costs that might be required to modify emissions monitoring devices (Soloway 1999).

Also figuring in the case were the interests of Canadian producers of ethanol, an additive that could, albeit imperfectly, substitute for MMT.[28]

26. See the discussion of this issue in Hufbauer and Schott (1992), chapter 7.

27. Soloway (1999) provides an exhaustive treatment of the MMT case. It should be noted that the Ethyl Corporation had announced prior to the passage of the Canadian bill that, if the bill went into force, it would be challenged under the NAFTA procedures.

28. Soloway (1999) argues that the ethanol producers in Canada tended to serve as the "bootlegger" faction of a "bootlegger-Baptist" coalition against Ethyl. In such a coalition, two quite disparate constituencies form an alliance over a public policy issue, where the interest of one constituency (the "bootlegger") is largely commercially driven and the other (the "Baptist") is largely driven by matters of principle or ideology. Chapter 7 of this volume will argue that the whole issue of multinational rules on investment has in fact been captured by just such a "bootlegger-Baptist" coalition.

The ethanol producers promoted their product as an environmentally friendly alternative to MMT that did not pose a health hazard. Whether or not the use of ethanol as a substitute for MMT would on balance be good for health or environmental reasons is not actually clear: scientific evidence suggests that ethanol itself is a pollutant. Thus, the ethanol promoters probably are best seen simply as a special interest group who sought to use environmental and health concerns to benefit their commercial interests.

In any case, the Canadian bill did not ban the use of MMT outright on health or environmental grounds, because the scientific evidence against MMT was, in fact, rather thin. This evidence certainly did not give MMT a clean bill of health—some credible evidence did exist that MMT, when used as a gasoline additive, posed health risks. But this evidence was not conclusive enough to qualify MMT for a ban under the Canadian Environmental Protection Act, either for reasons of public health or for the potential of MMT to befoul automotive emissions control systems.

Thus, for the Canadian government, the ban on interprovincial trade of MMT was an indirect way of banning the suspicious chemical altogther when direct measures to do so were unavailable. The Ethyl Corporation could in principle have manufactured MMT in each of the Canadian provinces and sold it within the province of manufacture. In practice, however, this would have been prohibitively expensive, and therefore the ban on interprovincial trade of MMT effectively created a ban on the use of the substance in Canada. This set up the legal challenges that followed.

In fact, there were four such challenges. The first of these was pursued by Ethyl in Canadian domestic courts, where the company argued that the interprovincial trade ban on MMT was unconstitutional because it created a federal intrusion into matters reserved for the provincial governments.[29] Second, the government of Alberta, backed by several other provincial governments, brought a complaint under Canada's Agreement on Internal Trade (AIT). Alberta maintained that the MMT ban constituted a restriction on interprovincial trade that was illegal under provisions of the AIT that mirror GATT Articles I and III (on most-favored-nation status and national treatment). Third, as already noted, the Ethyl Corporation brought a complaint under NAFTA chapter 11, arguing that the ban violated that chapter's national treatment provisions and was tantamount to an expropriation, which would require compensation by the government. (It was mostly this last element that the NGOs seized upon, as detailed below.) Fourth, Ethyl appealed to the US government to initiate a complaint under the state-to-state dispute settlement procedures of NAFTA, alleging a number of non-chapter 11 violations.

29. As chapter 1 noted, under proposals made by this author (in Graham 1996), Ethyl would not have been allowed to invoke investor-to-state dispute resolution proceedings until domestic alternatives within Canada had been exhausted. If the dispute were not resolved to Ethyl's satisfaction in these proceedings, Ethyl could then show cause that the result of the domestic proceedings was likely in violation of Canada's obligations under NAFTA.

The fourth challenge was never pursued, because the US government decided not to respond to Ethyl's request. The first, domestic case never went to trial, because the MMT ban was repealed before the trial opened. With respect to the remaining two challenges, on 12 June 1998 the government of Alberta won its case asserting that the MMT ban violated the AIT. Following this, on 20 July 1998 the Canadian government agreed to a monetary settlement of Ethyl's NAFTA case before the case went to formal dispute settlement procedures.[30]

The outcome of Ethyl's NAFTA challenge provided much fuel to the fire of those NGOs that opposed NAFTA. Although the case had not been formally ruled in Ethyl's favor, the NGOs saw the settlement as a tacit admission by the Canadian government that it was unlikely to prevail. If, these NGOs claimed, Ethyl could use NAFTA to effectively strike down this particular environmental law, then no environmentally motivated law or regulation in the United States, Canada, or Mexico was safe from challenge under the agreement.

Meanwhile, in May 1997, a draft text of the MAI dated January of that year had been placed on the Internet by Multinational Monitor, an NGO. The text contained provisions very similar to those under which Ethyl was pursuing its NAFTA chapter 11 complaint against Canada; in particular, the MAI contained provisions to establish investor-to-state dispute settlement procedures and to establish standards for investor protection that were very close to those of NAFTA. The posting of this document sounded an alarm that spread almost immediately throughout the worldwide community of NGOs. If, as the NGOs feared, NAFTA chapter 11 could be used to challenge laws that effectively banned the use of a potentially toxic substance, then the MAI, if it came into effect, could be used to challenge any such law or regulation in any country that signed the agreement.

Thus, among the NGO community, the MAI came to be known as "NAFTA on steroids." The antienvironmental "muscle" they perceived to exist in NAFTA would be dramatically pumped up if the MAI were to come into force. (In fact, this muscle had yet to be demonstrated—at the time, Ethyl's NAFTA case had not yet been settled in Ethyl's favor.) The "NAFTA on steroids" argument proliferated in the months that followed, mostly on the Internet but also in handbills and posters. The tone of the NGOs' campaign at times crossed over into hyperbole. For example, in Geneva in 1998 this author saw numerous posters placed by anti-MAI activists. These posters depicted the MAI as a Godzilla-like monster wearing an Uncle Sam top hat and presiding at a ball, where serpents variously identified as the OECD and other international organizations danced with other serpents bearing the logos of major multinational firms. The posters epitomized the mixing of environmental and antibusiness themes that characterized much of the NGO opposition to the MAI.

30. The AIT panel report can be found at http://www.ec.gc.ca/press/mmt98_n_e.htm.

Despite this flurry of anti-MAI activity during the second half of 1997, the MAI negotiators at first seemed unaware of the intensity of the storm that was gathering. Indeed, the first hint that the NGOs were mounting an activist opposition to the MAI reached official circles only in February 1998, when US Trade Representative (USTR) Charlene Barshefsky received a letter cosigned by the heads of nine NGOs stating that their groups would oppose the MAI. Most of these groups were advocates of environmental protection and/or preservation of wilderness and wildlife.[31] These groups' initial lack of familiarity with international economic policymaking was reflected in the fact that the letter was addressed to the USTR, when in fact the State Department was the lead US agency for MAI negotiations.[32] In a later letter, these groups addressed their concerns both to the Secretary of State and to the USTR.

What followed might have been a series of dress rehearsals for the large-scale demonstrations that took place in Seattle at the time of the WTO ministerial meeting there in November 1999. Beginning in the summer of 1998, representatives of some NGOs posted themselves regularly near the OECD's offices in Paris, where they beat on drums and chanted anti-MAI mantras. In the meantime, the US organization Public Citizen Trade Watch, founded by Ralph Nader, became the coordinator of anti-MAI activity in the United States. This organization held a number of rallies against the MAI in Washington during 1998, circulating leaflets calling for a "large and rowdy crowd" to assemble on Capitol Hill. The leaflets for one such rally announced a special guest appearance by "the Corporate Fat Cat." An academic colloquium on the MAI was held at the Cornell University Law School in March 1998 and was attended by this author. The colloquium was open to the public. Most of the attendees proved to be activists who had come to demonstrate against the MAI. The Deputy US Trade Representative, the keynote speaker, was greeted by a phalanx of demonstrators bearing anti-MAI signs, at least one of which suggested that to ratify the MAI would bring on the apocalypse.

Rowdiness was very evident at the June 1998 ministerial meeting of the WTO in Geneva, where persons calling themselves representatives of the NGOs organized demonstrations that turned into little less than street riots. The posters and flyers of the demonstrators were directed as much at the MAI as at the WTO. Anti-WTO and anti-MAI slogans were spray-

31. These were the World Wildlife Fund, the Center for International Environmental Law, the Friends of the Earth, the Community Nutrition Institute, the Defenders of Wildlife, the Institute for Agriculture and Trade Policy, the Sierra Club, Greenpeace, and the National Wildlife Federation.

32. The State Department is the lead US government agency on all matters pertaining to the OECD, whereas the USTR is the lead agency for most trade issues, including trade negotiations conducted within the WTO (see chapter 4.) The NGOs' earlier interactions with the USTR on international trade issues, specifically the Uruguay Round and NAFTA, perhaps understandably led them to assume that the USTR also was in charge of the MAI negotiations.

painted on buildings throughout the city indiscriminately. The personal automobile of the ambassador to the WTO from Jamaica was overturned and burned. A Swiss television documentary captured some of the details of these events.

Although the campaign mounted against the MAI clearly suffered from excesses, some of the NGOs' objections were not without substance. Indeed, Ethyl's NAFTA case against Canada raised some deep and troubling issues and arguably revealed some serious flaws in both NAFTA and the MAI. At the root of these issues is how governments should deal with "takings," that is, the seizure of property by governments from private citizens for a public purpose.

In the MAI, and in NAFTA, the takings issue centers around provisions in both documents pertaining to investor protection and investor-to-state dispute settlement procedures.[33] Perhaps the first thing to be said on this issue is that, in every nation of the world, governments have the right under certain circumstances to seize private property. However, the second thing to be said is that, in established democracies at least, these circumstances are usually precisely defined, and the government must meet certain obligations when it exercises its right of seizure. The exact circumstances in which seizure is permitted, and the exact obligations that the government must then meet, vary from country to country. But in much of the world, a number of general standards apply to the seizure of *tangible* property. For example, in general the seizure must be for a public purpose, be conducted under due process of law, be nondiscriminatory, and be followed by prompt, adequate, and effective compensation of the property owner.[34] And, indeed, the investor protection provisions of both the MAI and NAFTA contain language that establishes these standards; chapter 3 reviews these provisions in some detail.

US law and, indeed, the law of most countries are thus quite clear about seizure of tangible property, for example where the government takes title to land in order to build a road. The original owner might have no choice in the matter of the land being seized, but he or she is entitled to compensation. This kind of government taking is termed a "physical taking." But in other situations the law is not always so clear. For example, what if the government enacts a law or promulgates a regulation that has a legitimate public purpose but also has the effect of reducing the value of a privately owned asset, such as an ordinance that forbids loud noise late at night that in turn forces the owner of a bar to shut at midnight so that

33. What follows is based on Graham (1999a), which provides a somewhat more detailed examination of the issues, including extensive bibliographical citations.

34. The Fifth Amendment to the US Constitution, for example, provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." But the requirement of compensation has not always existed in American law.

some of the clientele choose to go to another bar in a less restrictive neighborhood? Such a reduction in value of an asset as the result of a government regulation is termed a "regulatory taking." Whether regulatory takings have the same standing in law as physical takings is an issue with a long history.

There was, in fact, a time in US history when many laws or regulations that led to regulatory takings might have been struck down by US courts as violations of the Fifth Amendment. Indeed, the first US law to create an income tax was struck down by the US Supreme Court in 1895 on these grounds. The creation of a federal income tax thus required a constitutional amendment, which was not passed until almost twenty years later, in 1913. During the first two decades or so of the twentieth century, the so-called Lochner era,[35] a number of laws passed by Congress and signed by the president to regulate industries (including to establish standards for workplace safety) were struck down by US courts as creating unconstitutional takings. Certain laws to protect public health, safety, and morality were excepted, but these exceptions were quite narrow and generally did not extend to laws regulating the safety of the workplace or the quality of the environment.[36] After a landmark case in 1922, US courts began to find that most laws designed to promulgate standards pertaining to public health and safety were in fact constitutional.[37] However, there survived a rather imprecise "rule of diminished value," which left open the possibility that certain regulations could be ruled, in effect, overzealous and thus creating a taking subject to the Fifth Amendment.

Today the boundary between a regulatory taking that is subject to the Fifth Amendment and one that is not remains somewhat murky in US law.

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35. After the landmark case Lochner vs. New York, 198 US 45 (1905).

36. The prevailing standard was the "noxious use doctrine," also termed the "harm doctrine." Under this standard, a regulation affecting use of a private property was held not to be a taking if the property, unregulated, created a situation that was injurious to the health, morals, or safety of the community. In implementing the harm doctrine, courts applied two tests. The first was a "means/end" test to determine whether the regulation actually prevented the harm it addressed. The second was a "cause/effect" test to determine whether the regulated party actually caused the harm. Although in principle the harm doctrine, and the two tests applied toward it, seem quite reasonable, in practice early in this century they often were employed very narrowly or stringently, so that regulation that today would be generally accepted as in the public interest was in fact struck down. For example, the courts generally accepted zoning laws requiring factories that produced noxious emissions to be located only in certain districts, but they might not have accepted laws requiring these same factories to install devices to reduce those emissions.

37. The case was Pennsylvania Coal Company vs. Mahon, US 393 (1922). In this case, Justice Oliver Wendell Holmes articulated the doctrine that the government can regulate the use of private property to prevent public harm unless the regulation "goes too far" in reducing the value of the property. This opinion did not actually reverse the noxious use doctrine of the Lochner era, but rather softened it somewhat, so that courts might accept a less stringent standard as to what constitutes noxious use or harm.

One school of legal thought holds that regulatory taking under at least some circumstances should be treated equivalently to a physical taking (see Epstein 1985). A 1992 Supreme Court ruling (in Lucas vs. South Carolina Coastal Council) that a state prohibition on development on beachfront property created a requirement that owners of such property be compensated for the resulting diminution of the value of the land tilts somewhat in this direction. This ruling was, in fact, met with consternation and ire on the part of environmentalists (McUsic 1996). However, legal scholars have largely interpreted this ruling as applying to land use only and not to regulation of other types of assets. They note that US law has long applied somewhat different standards regarding taking of land than regarding taking of any other asset, possibly because Congress seemed most clearly to have land in mind in framing the Fifth Amendment.

US law is, in fact, among the most friendly toward property holders on the matter of takings. In most countries' law, regulatory takings are for all practical purposes exempt from requirements for compensation, even when such requirements might apply to physical takings by the government.

What the NGOs brought to light is that NAFTA (and the MAI, had it come into force) could be interpreted as creating a new doctrine toward regulatory takings. This doctrine would be much more friendly to owners of assets whose value might be diminished by regulation than is any national law in effect in the OECD countries. Article IV.2.1 of the draft MAI states that:

> A Contracting Party shall not expropriate or nationalize directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as "expropriation") except:
> a. for a purpose which is in the public interest,
> b. on a nondiscriminatory basis,
> c. in accordance with due process of law, [and]
> d. accompanied by payment of prompt, adequate, and effective compensation.

The phrase "measures having an equivalent effect" could reasonably be interpreted to encompass regulatory takings. Thus these previsions do *not* seem to preclude that a regulatory taking could be treated as an expropriation and, hence, be subject to the requirement for compensation. This was a key point argued by the Ethyl Corporation in its NAFTA case. Under this interpretation, NAFTA and the MAI would both seem to grant to international investors a privileged position, in that these investors could seek compensation for regulatory takings through a venue not available to domestic investors under like circumstances. Furthermore, the rules under which international investors could press such claims for compensation would be highly favorable to them, and more favorable than those under which domestic investors might press similar claims (in other venues).

It is difficult to explain how the negotiators overlooked this problem. (Or perhaps some of them did not overlook it: as noted earlier, US negotiators had no objection to any provision that would create better treatment for US investors in a foreign country than was accorded to domestic investors in that country. Indeed, the US negotiators were eager for other countries to accept such provisions.) But clearly such an asymmetry has no place in a multilateral agreement. As already noted, such an asymmetry could lead to perverse responses by domestic investors. Such investors might decide to set up operations in foreign countries and use these to make investments in their own home country, simply in order to claim the better treatment accorded to foreigners. Quite a lot of domestic law might be circumvented in this manner—a point that the NGOs seem to have missed.

However, it must be remembered that this interpretation of MAI Article IV.2.1 (and the equivalent language in NAFTA) is not the only possible interpretation. Unfortunately, no tribunal has yet had the chance to rule on the matter, or at least none had by the time the NGOs rallied against the MAI. In particular, the Ethyl Corporation's case never got heard by a NAFTA tribunal. But contrary to the NGOs' claim, the fact that the Canadian government settled the case does not necessarily signal that it believed it would have lost that part of the case based on Ethyl's claim that the interprovincial trade ban was equivalent in effect to an expropriation. Indeed (and this is a point never made in NGO literature), this claim might have been the weakest link in Ethyl's NAFTA dispute with Canada. A counterargument can be easily made, based on NAFTA Article 1114:

> Nothing in this Chapter [i.e., chapter 11] shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

It is thus quite possible that the tribunal might have ruled out Ethyl's claim of expropriation on grounds that the interprovincial ban, being motivated primarily by environmental concerns, was subject to an immunity created by Article 1114.

If this was so, why did Canada agree to settle the case before it went to the tribunal? Doesn't this prove the NGOs' contention that Canada expected to lose, and hence that the above interpretation of MAI IV.2.1 would likely have been locked in through the NAFTA precedent? The answer is no. Even if the tribunal had found that the ban on interprovincial trade of MMT was not an expropriation, the government of Canada might still have lost the case for other reasons. For example, as Ethyl also argued, the ban could have been interpreted as a de facto performance requirement to force the MMT additive to be manufactured in every province; this would have violated NAFTA provisions banning local content requirements on international investors. Such a finding arguably would not have

been subject to Article 1114 because, had MMT been manufactured and used in each province, the environmental risk would have been the same as if interprovincial trade in the chemical had been allowed. Had the government lost the case on these grounds, it would have weakened the NGOs' claim that the case established a presumption that takings created by environmental regulations could be treated under NAFTA and the MAI as expropriations. Perhaps less likely, the court might have found that the main purpose of the MMT ban was to favor the Canadian ethanol industry, and that the ban was therefore inconsistent with NAFTA, which requires national treatment for investors from another NAFTA country.

Some have argued that it is unfortunate that the case never reached the tribunal, because an opportunity to rule on the scope of the expropriation language was thereby lost.[38] As matters stand, whether the investor protection provisions of NAFTA (or the MAI) would apply to regulatory takings is unresolved.

Further, if governments would prefer that these provisions (in NAFTA or the MAI) not be interpreted as applying to regulatory takings, they can act to remove the ambiguity in the current language. Indeed, MAI negotiators interviewed by this author said that, had the negotiations resumed in the fall of 1998, removal or revision of the offending language would have been considered. Also, the MMT case has led the NAFTA countries to actively consider how best to remove regulatory takings from the coverage of the investor protection provisions. But at the time of this writing, no action had been taken.

According to the negotiators, the language in question was never intended to cover regulatory takings by governments that might result from laws or regulations to protect the environment or public health or safety. Hence it was never anticipated that the investor protection provisions would be used by a private investor, through NAFTA's enterprise-to-state dispute settlement procedures, to sue for compensation for such a regulatory taking. Many agreements entered into by human beings do, of course, lead to unanticipated and undesirable outcomes. When this happens, a reasonable response is for the relevant parties to alter the agreement so as to avoid such outcomes in the future.

However, for the MAI the solution is not as simple as striking the words "measures having equivalent effect" from the draft Article IV. That language was included because the negotiators wanted the agreement's expropriation provisions to cover "expropriation via the back door." It was meant to cover any measure that a country might have taken for ostensibly legitimate reasons but whose real intent (or consequence) was to force the exit of an unwanted, foreign-controlled enterprise from a local market. For example, during the 1950s, populist regimes in some developing countries had used price regulation to prevent foreign-controlled firms

38. Soloway (1999).

from raising prices in response to inflation, in effect forcing these firms to sell their output below cost. The firm then had to choose either to stay in the market and subsidize its customers, or to exit the market, which usually meant selling its assets for less than their market value. It was not unreasonable for the negotiators to seek to curtail such practices. One solution, therefore, might have been to have insert a provision like the following:

> Article IV.2.1 will not apply to any measure taken to protect public health or safety; to ensure the preservation of a species of plant or animal; or to safeguard the physical environment, provided that the measure is applied in a manner that does not discriminate against any individual or class of investment or investor in order to achieve a benefit for some other individual or class of investment or investor.

This would require that, if a case that involved a regulatory taking were brought under investor-to-state dispute settlement procedures, the disputant (the investor) would have to demonstrate that the relevant measure was discriminatory. The dispute settlement tribunal would have to decide whether this condition was met.

Thus, to the extent that the investor protection provisions of the MAI, when coupled with the agreement's investor-to-state dispute settlement procedures, actually did pose a threat to environmental protection laws, as the NGOs claimed, this was a problem for which solutions could have been found. It was not necessary to reject the MAI entirely to fix this particular problem. Unfortunately, although the NGOs did succeed in identifying (or at least in publicizing) what is arguably a major flaw in both the MAI and NAFTA, they also greatly exaggerated its likely impact. Indeed, the more radical NGOs tended to generalize this one correctable flaw into a characterization of the whole MAI as something close to evil incarnate. One unfortunate consequence is that these organizations missed a very real opportunity to play a constructive role in correcting the flaw. Instead, they—or at least a dominant subset of them—chose to use the opportunity to try to bring the whole exercise down. It can be argued, of course, that in this they were highly successful. But it remains to be seen whether, in sealing the agreement's fate, the NGOs did a service to the causes they espouse. It may be that, by acting as they did, they performed a major disservice to their own long-run missions.

To see why this is so, consider the following. The NAFTA investor-to-state dispute settlement procedures have been in place now for five years, yet corporate interests have brought challenges against only a handful of environmental laws or regulations under these procedures.[39] There appear to have been about five to seven such cases to date, the exact number de-

39. In addition to the Ethyl case in Canada, a case brought against Mexico by the Metalclad Corporation of the United States had environmental implications. Metalclad alleged that delays in approval of its purchase of a hazardous waste site in the state of San Luís Potosí constituted an expropriation. The delays originated at the state level, not at the Mexican federal

pending on which cases one classifies as involving environmental and public health issues. Moreover, of the few challenges that have been brought, none have been resolved against the environmentalists' interests. Certainly, then, the wholesale gutting of environmental regulation that some predicted simply has not happened. Some environmentalists claim that the Ethyl Corporation's challenge of Canada's effective ban on MMT demonstrated that NAFTA does pose a threat to environmental law. But, as we have seen, the ban in question was on interprovincial trade in MMT, not on its manufacture or use. And the Canadian government took this route because the case for an outright ban on environmental or health grounds was too weak to permit a ban under Canada's existing health and environmental laws. Thus, if Ethyl had won its NAFTA case, it would have created an unfortunate precedent, but it would hardly have been a shattering blow to the cause of environmentalism. These facts should be contrasted with the claims of some NGOs. These groups assert that, if the MAI had come into force with provisions similar to those of NAFTA, it would have resulted in a crushing reversal of virtually all progress made over the past several decades to implement laws and regulations to protect the environment. That claim is, to put it mildly, overblown. And, as noted above, to the extent that the MAI poses a danger to environmental law, the danger could be easily eliminated, and the negotiators were prepared to try to correct the danger, had the MAI negotiations continued.

Perhaps recognizing that, by any reasonable standard, the substantive problems that the environmental NGOs might have had with the MAI were ones that could be fixed, the OECD did invite representatives of NGOs to meetings held at the OECD headquarters. The invited NGOs effectively divided into three groups. One group refused to participate at all, indicating that the only acceptable outcome was for investment negotiations at the OECD to cease entirely. Another group did send representatives, but once inside the OECD these representatives saw their mission solely as one of delivering the message, "Death to the MAI!" A third group sent representatives who sought to work with the OECD Secretariat to propose changes to the MAI to make it environmentally friendly. However, this third group was rather a small one.

These meetings were, in fact, the first ever at which the environmental NGOs were asked to participate directly in the process of negotiating a multilateral commercial agreement. An opportunity for constructive exchange was thus created whereby the NGOs could have offered valuable

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level. One issue was whether the state of San Luís Potosí would create an expropriation by forbidding hazardous waste processing on its territory. This case was decided in favor of Mexico. For an environmentalist perspective on this and other NAFTA cases, see Van Dyke, Porter, and Sewall (1999) and Swenarchuk (1999). Recently, however, the number of NAFTA chapter 11 cases has grown; hence, the environmentalist position might yet be proved correct, but only if the tribunals hearing the cases start deciding in favor of firms on regulatory takings issues.

substantive input. To be sure, at the end of the day this exchange might have failed to give the environmentalists much satisfaction. But had this been the outcome, they could have walked out, held a press conference to air their grievances, and the world would have noted that they had tried and failed.

More likely, however, is that the outcome would have been much more favorable to the NGOs. The MAI negotiators in 1998 were in a genuine quandary over what to do about the regulatory takings issue raised by the Ethyl case, and their sense was that this indeed was a problem that needed fixing. By refusing to engage the OECD and the negotiators in a constructive dialogue, the NGOs in effect walked away from a wide-open opportunity to achieve something that they could have claimed as a major substantive victory as opposed to the major PR victory that they did claim. They could have rightly claimed that an important multilateral negotiation had, under their advice, removed from proposed new rules provisions that had the potential to cause environmental damage. Had this been the outcome, the resulting "MAI precedent" might have reverberated all of the way to Geneva: henceforth, multilateral trade agreements would have had to be concluded in a way that addressed environmental concerns. Instead, however, the NGOs largely chose to remain outside the negotiating process or, if they did come into the negotiating room, to use the opportunity merely to shout.

Did their shouting bring down the MAI? Many NGOs seemed to think so, and encouraged by their perceived victory, they planned the demonstrations that took place in Seattle in November 1999. One of the rallying points was a site on the Internet on which was posted a "Call to Reject any Proposal for Moving the MAI or an Investment Agreement to the WTO."[40] The statement was signed by over 300 NGOs and begins as follows:

> The Multilateral Agreement on Investment in the OECD has run into problems because of strong public protests in many OECD countries as well as objections from developing-country groups and governments. Objections from the public include that the MAI would grant new unprecedented rights for corporations (whilst removing the authority of states to place obligations or regulations on them), threaten national sovereignty and the viability of domestic firms and farms, remove conditions for development in the South and magnify environmental and social problems. Since there is no sign that the OECD governments are willing to consider a basic change in the premises and framework of the MAI, we call for the termination of the negotiations and the treaty in the OECD.

The statement goes on to note that "some OECD governments, including the European Union" were seeking to move the MAI process to the WTO. It opposes this move and asserts further that "promises to include environmental and social concerns are likely only to be an eyewash to coopt the public to accept the basic tenets of the MAI." An MAI-like agree-

40. See http://www.tradewatch.org/MAI.htm.

ment at the WTO, according to the statement, would have "disastrous effects" on the developmental prospects of poorer countries and would force countries to change domestic laws and policies "even if these were to cause job losses, closure of local enterprises and farms, financial instability, balance of payments deficits, and environmental degradation."

The Cavalry That Did Not Arrive

One of the key questions raised by the history of the MAI (see chapter 1) is why the international business community did not support the negotiation more strongly than it did. If, as its opponents claim, the MAI amounted to a munificent feast for the "corporate fat cats," why did these interests fail to mount a countercampaign to keep the feast from being spirited off the table?

The US business community did, in fact, initially support the MAI undertaking with greater enthusiasm than did business groups in Europe or Japan. According to several spokespersons for US business groups, the main reason they and their foreign counterparts did not do more was that "there was not much 'there' there." In their eyes, the prospective MAI was no feast, but rather at most a modest picnic.

In an initial round of enthusiasm, a number of business groups, including the US Council for International Business, polled their members to determine what objectives they would like the MAI negotiations to achieve. The overwhelming response was "up-front liberalization," for example, removal of existing investment barriers in the European Union. As already noted, these were to be found predominantly in the services sector—hardly one noted for its environmental depredations.

The nonchalance of the business community supports the notion that, at the end of the day, the MAI as drafted would have done little to change anything. And the disagreements among the negotiating parties largely centered on proposals that would have taken investment liberalization several steps backward. The case could be made that the furor of the NGOs was largely a tempest in a teapot.

Was this really the case? The next chapter attempts to glean some insight into the substance of the MAI through a close look at the document itself, as it stood at the time the negotiations were terminated.