Multilateral Agreement on Investment:

Lessons for the WTO from the failed OECD-negotiations

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Economic, political and legal developments in the 1990s occasioned OECD members to start negotiations on a multilateral agreement on investment (MAI) in 1995. Three years later these negotiations broke down. While internal disagreements abounded, the opposition from parts of civil society had an important role to play. This paper examines the radical critique by NGOs and the more qualified critique by parliamentary enquiries. It argues that both suffer from a number of misperceptions on the consequences the MAI would have had in reality. It suggests what some of the real problems with the draft treaty might have been. Understanding of these issues is important should negotiations move on to the WTO some time.

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Introduction

'Negotiations on the MAI are no longer taking place' (OECD, 1998d). This short sentence, issued by the Organisation of Economic Co-operation and Development (OECD) in a press release on 3 December 1998, informed the public about the failure of over three years of intensive negotiations on what was supposed to become a Multilateral Agreement on Investment (MAI), which sought to establish binding rules on the treatment of foreign investment by host countries. While it is true that negotiations also failed because of substantial disagreements among the negotiating parties, as can be seen by the many alternative formulations and points to be agreed on in the draft treaty text (OECD, 1998a), the rising tide of opposition against the MAI from both members of parliaments and nongovernmental organisations (NGOs) played an important role in bringing down the negotiations.

The failure of MAI negotiations at the OECD level does not mean that a multilateral agreement on investment is off the table. Indeed, the same press release by the OECD that makes public the failure of negotiations goes on to state that 'officials reaffirmed the desirability of international rules for investment' (OECD, 1998d) and both Japan and the European Union are committed to negotiations on investment as part of their broader push for a new so-called Millennium round of negotiations at the World Trade Organisation (WTO), which they want to be enacted at the WTO ministerial meeting in Seattle in late November 1999. The prospects for success

of this demand are unclear as many, but not all, developing countries appear to be opposed against a new round of WTO negotiations in general and a multilateral investment agreement in particular. Presumably much depends on how fast the emerging market economies in Asia and Latin America can recover from the shock of economic and financial crisis. But sooner or later, the essence of the MAI will reappear on the negotiation table, in one form or another.

The economic, political and legal background

While attempts at regulating international flows of investment are not new[1], it is no coincidence that a major round of negotiations was launched in the mid-1990s. A defining character of this decade has been the continuation and strengthening of what has become known as economic globalisation: International trade has been growing faster than world economic output in every decade after 1950 and since around the mid-1980s foreign direct investment flows are growing faster still on average than international trade flows (UNCTAD, 1993, annex table 1; UNCTAD, 1994: 127; UNCTAD, 1998a, annex table B.1).

International private flows of financial resources have increased from 33 billion US$ in 1986 to 252 billion US$ in 1997 (OECD, 1988, statistical annex, table 12; OECD, 1999, statistical annex, table 1). While the rather volatile and often speculative portfolio flows have risen at a tremendous speed in the early 1990s, still more than 50% of private flows consist of foreign

[1] According to Picciotto (1998, 742f.) these attempts date back to a failed League of Nations draft convention in the 1920s.

direct investment (FDI) and about 15% of commercial bank loans (UNCTAD, 1998a, 14f.). The developed countries are both the dominating source and the major recipient of FDI, but this dominance has decreased over time with developing countries in the 1990s receiving almost 40% of FDI as opposed to only about 20% in the 1980s (UNCTAD, 1993, annex table 1, and UNCTAD, 1998a, annex table B.1). Indeed, FDI inflows per unit of GDP are much higher in developing as opposed to developed countries (UNCTAD, 1998a, 10).

Private international flows of financial resources have become increasingly important to developing countries as official development assistance from the developed world has dried up because of tight budgets and a decreased willingness to assist. The official development assistance share of the total net resource flows to developing countries has decreased from 64.1% in 1988 to merely 23.6% in 1997 (OECD, 1999, statistical annex, table 1). It is often asserted, however, that international investment flows benefit only about a dozen developing countries in Asia and Latin America, whereas the vast majority of poor countries, especially in Africa, are left out. This assertion is correct in the sense that countries like Brazil, Mexico, Argentina, Chile and Venezuela in Latin America and China, Singapore, Indonesia, Malaysia, Thailand and India in Asia together received almost 80% of all the FDI flowing to the developing world in 1997 and more than 60 times more than the combined FDI to all least developed countries together (UNCTAD, 1998a, annex table B.1). However, the picture is much less uneven if one looks at FDI as a percentage of gross fixed capital formation rather than at FDI expressed in absolute figures. This percentage was 7.3

for Africa in 1996, only slightly lower than the developing countries average of 8.7 or the percentage of Argentina (9.7) and Brazil (7.5) and considerably higher than either India's (2.9) or Thailand's (3.0) (1998a, annex table B.5).

The expansion of private investment flows have been accompanied by policy changes towards a more investment-friendly environment that makes countries more receptive for these flows. According to UNCTAD (1998a: 57), since 1991 on average about 50 countries each year enacted on average about 100 regulatory policy changes every year, the vast majority of which were favourable towards FDI. However, because competition for scarce financial resources is tough and countries fear to lose out in the bid for foreign investment, the last fifteen years or so have also seen an increase in incentives that are supposed to lure investment, especially FDI, into a specific location rather than elsewhere. An UNCTAD (1996, 17) study comes to the conclusion that 'the range of incentives available to TNCs, and the number of countries that offer incentives, have increased considerably since the mid-1980s, as barriers to FDI and trade have declined.'

The proliferation and inflation of these incentives is often regarded as socially wasteful as in general they do not increase the overall amount of FDI available, but merely distort the efficient allocation of flows.[2] It does not matter much that studies of the determinants of FDI flows generally

[2] To a certain extent, incentives might increase the amount of available investment as, ceteris paribus, they raise the return on investment and thereby the opportunity costs of consumption. Also, incentives, especially subsidies, can be justified on efficiency grounds if foreign investment generates positive externalities to the wider host economy.

indicate that incentives have only a very minor role to play in international investment decisions (UNCTAD, 1996, 41). This is for two reasons: First, these incentives can make a difference at the margin and second, and more importantly, what matters is that, against the received wisdom of empirical studies, policy makers apparently do believe in the power of incentives to attract investment.

The economic and political changes towards a more investment-friendly global economy have been legally backed by a tremendous increase in Bilateral Investment Treaties (BITs). Since Western Germany negotiated the first two treaties in 1959, the number of BITs has increased to over 1300 by the end of 1996, with almost 1000 treaties coming into effect after 1990 and 162 countries participating in one or more treaty (UNCTAD, 1998b, 9f.). BITs vary from country to country, but have by now usually the following major characteristics in common (see UNCTAD, 1998b; Vandevelde, 1998):

- the definition of investment is broad and not restricted to FDI.
- foreign investment is granted fair, equitable and national treatment with qualifications. This means that foreign investors are not discriminated against relative to domestic investors and are treated similarly in like circumstances.
- foreign investors are guaranteed most favoured nation treatment. This means that any benefits granted to one foreign investor must automatically be granted to all foreign investors.
- expropriation is only allowed with due compensation.

- an investor to state dispute settlement provision enables an independent arbitration panel to make binding decisions in case of conflict.

In search of justification: Is a MAI necessary?

The economic, political and legal background can provide a justification for the need for a MAI. The increasing importance of private investment flows renders a potential MAI more significant. Whereas in former times one could have argued that investment flows were minor relative to international trade flows so that there was no need for a special agreement, the sheer size of the increase of flows invalidates such an argument. Similarly, the manifold, but rather uncoordinated steps towards a more liberal and investment-friendly environment can provide a justification to make these policy changes more systematic and to make them irreversible by locking them into an international agreement. The socially wasteful increase in investment incentives, on the other hand, calls for putting disciplines on potential host countries. Furthermore, a MAI could make the widespread, but rather chaotic, system of BITs more transparent and render unnecessary the establishing of new BITs and could make the legal framework in which investment flows operate more certain.

At the same time, however, the very same factors that can provide a justification for a MAI can also be invoked to dispute its necessity. The very fact that investment flows have increased tremendously without a MAI puts into doubt that such an agreement is necessary to sustain these flows or enable further increases. With respect to the legal framework one could argue that a MAI is undesirable as by definition it cannot fit the special circum-

stances of the contracting parties as well as a BIT can and is unnecessary as hundreds of BITs already exist. Furthermore, empirical studies show that investment treaties have virtually no influence on where FDI, the most desired form of investment, flows to (UNCTAD, 1998b, 122). There exist many countries in Africa that have signed many BITs, but hardly receive any FDI. On the other hand, there exist many countries, for example Mexico, that have signed no or very few BITs, but receive massive inflows of FDI.

Given that the economic, political and legal background can be invoked both for the necessity of a MAI and its irrelevance, it is not entirely clear why the world is in need of a multilateral agreement on investment in whatever form. The OECD negotiators have always argued that they aspired to create an agreement of the highest standard (OECD, 1998b). Indeed, the draft for the MAI contained several main characteristics that distinguished it sharply from most BITs (see OECD, 1998a). The three most important ones are as follows:

- The principles of treatment, such as fair, national and most favoured nation, were supposed to apply not only to existing investment, but granted already in the so-called pre-establishment phase. Thus potential investors were supposed to gain significant rights of entry.
- A comprehensive range of performance requirements were supposed to be prohibited and others only allowed if accompanied by financial compensation. This means that foreign investors could not be required to meet conditions such as employing local staff or using local production inputs.

- The definition of what constitutes an expropriation of assets was supposed to be wide, covering both *de facto* as opposed to merely *de jure* expropriation and indirect expropriation as well.

It is exactly this high standard of the draft agreement that was confronted with the strongest criticism.

Radical opposition: The critique by NGOs and trade unionists

Environmental, developmental and other NGOs as well as trade unionists opposed virtually every substantial aspect of the draft MAI and have pledged to oppose with quite the same fervour any future agreement with similar provisions as well. The major aspects of their critique can be summarised as follows:[3]

- Because investors were supposed to gain a general right of entry, governments could no longer ban FDI from investors with a bad record on environmental and labour issues Also, investment in certain sectors of the economy could no longer be banned.
- Similarly, national and most favoured nation treatment would disable governments and local communities to punish foreign investors for atrocities they supposedly undertake somewhere else with respect to either the environment, labour standards or human rights.

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[3] For a joint NGO statement on the MAI, see Anonymous (1997). For a comprehensive list of links to NGO webpages see the 'Annotated List of MAI Websites' at http://www.corpwatch.org/trac/globalization/treaties/mailinks.html.

- Because of the general prohibition of performance requirements governments would no longer be able to favour local industries or require foreign investors to employ local workers or use local production inputs.
- The liberalisation of investment regimes would allow companies to relocate to the lowest cost productions sites. The MAI would have pre-empted 'strategies for restricting corporate flight to low-wage areas — a major cause for job loss and income stagnation in the industrialized world'. The protectionist and nationalist tune is also and in particular played by trade unionists (see, for example, AFL-CIO, 1998 and White, 1998). Not surprisingly, the US trade union AFL-CIO (1998) also opposed the immigration clause of the draft MAI which allowed key personnel the temporary right to enter and stay inside the host country.
- The threat of relocation would already suffice to undermine the bargaining power of trade unions. Similarly, the broad definition of expropriation together with the compensation requirement and the possibility for investors to sue governments before an international arbitration panel for dispute settlement is regarded as sufficient to scare policy makers away from passing stringent environmental and social regulation.

As this list makes clear, the NGOs and trade unionists are completely opposed to the very intention of a MAI, which is to liberalise the international investment regime. In a strategic move that exhibits their rhetorical skills, they do call for an international agreement on investment, but with intentions that are exactly opposite to liberalisation. A declaration, which has been signed by several hundred NGOs from mainly developed countries,

calls for 'global and national guidelines, rules and regulations to place obligations on investors and corporations so that their activities and products serve the needs of people within a framework of internationally fair, socially just and environmentally sound development' (Third World Network, 1998). Instead of removing regulatory hindrances for investment flows and putting disciplines on potential host countries, it is foreign investors who need to be disciplined by an international agreement, according to this view. In the same vein, Clarke (1998) leaves no doubt about the anti-liberal thrust of his blueprint for an alternative 'Citizen's MAI'. If such an agreement ever came into effect, then international investors would be required to 'give adequate notice to a local community of intent to shut down or move operations; plus provide adequate compensation to the local community' and key sectors of the economy would be exclusively reserved for public ownership.

Many of the arguments summarised above also show that both NGOs and many trade unionists are not only fundamentally opposed to any form of MAI, but oppose more generally the very idea of trade liberalisation and the concept of economic globalisation. Indeed, the draft MAI seems to have served the function of a rallying device for NGOs, trade unionists and all other groups and individuals opposed to a liberal world economic order. This observation is confirmed by NGO activist Clarke (1998) who assures his readers that the fight against the MAI is 'part of the much larger struggle against the forces and institutions of economic globalization itself'.

Qualified opposition: The critique by parliaments and sub-national governmental institutions

Partly in response to the vigorous criticism of NGOs and other groups opposed to the MAI draft, there have been a number of parliamentary enquiries on the subject matter. These enquiries have found reason to object to both substance of the draft treaty text and the way negotiations were undertaken. In general, however, the critique put forward by these elected assemblies has been more qualified and less fundamental than the one advanced by NGOs.

In one of the first parliamentary enquiries, the Canadian Parliament's Sub-committee on International Trade, Trade Disputes and Investment (1997) called for the expropriation clause of the draft MAI to be narrowly defined so that governments would not run the risk of having to compensate investors for the mere exercise of their normal regulatory power and for open, accessible and transparent procedures for dispute settlement, which it saw violated by the fact that arbitration could take place behind closed doors if the investor so wishes. It also demanded to be kept permanently informed by the Canadian government about the state of negotiations which it wanted to take place in an open and transparent process. This latter point is echoed by the UK House of Commons Environmental Audit Committee (1998) and the Australian Joint Standing Committee on Treaties (1999). All these enquiries shared the concern of the NGO community that the negotiating parties, whether by intention or not, did not adequately inform the parliaments or the wider public about a subject that they regarded as extremely relevant to both parliamentarians and the general public alike. In a resolution to the European Commission, which took also part in the MAI negotiations, the European Parliament (1998) went as far as claiming that

negotiations were undertaken 'in utmost secrecy', which gave some support to the claim made by many NGOs that they were confronted with a conspiracy. The European Parliament, too, demanded a narrowing of the expropriation clause, expressed concern about the dispute settlement procedures and called for an inclusion of duties and obligations for foreign investors in the draft MAI so that, according to the Parliament's view, a better balance between investors' rights and obligations was achieved.

The most fundamental critique was raised in the so-called Lalumiere-report (Lalumiere and Landau, 1998), however. In 1998 the French government, which from the start had been rather sceptical about many of the draft MAI provisions, had commissioned a report to advise it on how to proceed with the then still ongoing negotiations at OECD level. European Member of Parliament Catherine Lalumiere and Inspector General of Finance Jean-Pierre Landau provided an intermediary report in September 1998, which condemns the draft MAI as fundamentally flawed. It demands that any future agreement on investment should apply a very narrow definition of investment excluding all portfolio investments and financial market operations, that the dispute settlement mechanism should only apply to sovereign nation-states so that private investors would be excluded, that the definition of expropriation should be narrow and exclude indirect expropriation, that only those performance requirements should be prohibited that are already forbidden under the WTO and finally that because developing countries are expected to become signatories to a potential agreement, the OECD was the wrong forum and negotiations should be undertaken at the WTO instead. This report had an important impact on the decision of the

French government to pull out of negotiations in October 1998, which in turn led to their breakdown in early December 1998 since the EU itself would have had to sign any MAI in addition to the Member States, and could only have done so had all Member States been supportive.

Common misperceptions

The critique of both NGOs, trade unions and parliamentary committees encompasses a number of misperceptions about which effects an actually enacted MAI would have had in reality and about how novel many of the draft MAI provisions were:

- The provision for dispute settlement is often portrayed as innovative, granting 'new rights in international law which are solely to the benefit of foreign investors' (Lalumiere and Landau 1998, 3). This is simply incorrect. That investors have access to binding dispute settlement procedures via third party arbitration has been a characteristic of many BITs and regional trade agreements like NAFTA long before negotiations on the MAI began.
- Similarly, the supposition that the investor-to-state dispute settlement provisions put foreign investors in a privileged position needs to be qualified at least. The governments of host countries can always use their own legal system to challenge foreign investors. That foreign investors have access to binding third party arbitration can be justified by the fact that many investors, rightly or wrongly, do not have much confidence and trust in the often under-developed and corrupt legal system of many poor

countries. Given that in the long history of BITs until April 1998 only 14 cases had been brought to the International Centre for the Settlement of Investment Disputes (ICSID), a World Bank daughter, it seems that the dispute settlement provisions have not been abused by foreign investors and have not put host countries at a comparative disadvantage.

- Withdrawing from the MAI was supposed to be a lengthy process according to the draft treaty. A country needed to file its intent of withdrawal five years in advance and after this period existing investments would still enjoy the protection of the agreement for another fifteen years. This provision is often portrayed as a revolutionary device and a mean attempt to lock signatory countries into rules friendly towards foreign investment (for example, Sforza, 1998). But, again, this provision is simply taken over from BITs which mostly also give substantial temporary protection to existing investment.
- That countries which accede to the MAI could no longer ban investment in certain sectors, put limits on mineral resource extraction or set up zoning regulations is an unjustified inference. This is because all countries were allowed to set up country-specific exceptions and especially potential future non-OECD signatories were promised to be given full consideration to their particular circumstances (OECD, 1998a, 103).
- That negotiations were undertaken in secrecy, and by malicious intention so, is an accusation that needs to be severely qualified at least. While it is true that the draft MAI treaty text was not publicly available until it was leaked to an NGO in February 1997 and subsequently published in the internet, the OECD had since then installed its own official MAI web

page. On the other hand, both the OECD and the participating countries could have done more to inform the public and especially the democratically elected members of parliament. When in late April 1998 ministers from OECD countries at their annual meeting pledged commitment 'to a transparent negotiating process and to active public discussion on the issues at stake in the negotiations' (OECD, 1998b), and both the OECD and governments from member countries started to invite groups from civil society for hearings and informal seminars, it was already too late to get rid of the conspiracy theories.

- The expropriation clause was initially drafted in a way that did not clearly rule out an interpretation that every and any public policy that diminished current or future profits could potentially be included under this clause. Such an interpretation together with the possibility of foreign investors to enforce their compensation claims via dispute settlement procedures prompted many critics to fear that the MAI would have undermined the ability of governments to exercise their normal regulatory control, especially over environmental matters. Either they would be scared away from enacting such policies or would have faced multi-million dollar compensatory claims in arbitration courts. However, this concern was largely unfounded. For one thing, such an outcome did not appear to be the intention of any of the negotiating party. To soothe these concerns somewhat, the Chairman of the negotiations proposed to include a 'specific affirmation that the MAI does not inhibit normal non-discriminatory government regulatory activity' and 'that the exercise of such powers will not amount to expropriation' (OECD, 1998c). Further-

more, he proposed to either include a general environmental exception to the MAI similar to Article XX of the GATT or to specifically allow performance requirements that are necessary to achieve environmental goals. In order to meet concerns that potential host countries would lower their environmental or other standards in order to attract FDI, a 'not lower measures' clause was to be included in the draft MAI text to ensure that a 'Contracting Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its domestic health, safety, environmental, or labour measures, as an encouragement to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of an investment of an investor' (ibid.).

- Related to this issue, the example that is most often invoked to support the above mentioned concerns, namely Ethyl Corporation versus Government of Canada, does not stand up to closer scrutiny. Because of the eminent role this example played in the opposition to the draft MAI, it is worth examining the case in some detail. In 1997 the Canadian parliament, based on an earlier decision by the Canadian government, passed Bill C-29 which banned the import to Canada and the interprovincial trade, but not the use, of MMT, a fuel additive of which Ethyl Corp. was the sole producer. The parliament justified this ban with health risks posed by the manganese content of MMT. Ethyl in turn filed a suit claiming that the act was unconstitutional and entered the investor-to-state dispute settlement mechanism claiming $347 million compensation under the expropriation clause of NAFTA. Independently, the province of Al-

berta, supported by two other provinces, challenged the act in Canadian courts as well, claiming that it violated Canada's Agreement on Internal Trade. On 20 July 1998, the Canadian government decided to avoid third party arbitration and agree on a settlement with Ethyl. In this it agreed to lift the ban on MMT and paid nearly US$13 million in compensation to the company. For opponents of the draft MAI this was clear proof of how dangerous an enactment of the treaty would be for a sound environmental policy.

However, at closer inspection the facts do not stand up to the claims made. To start with, the scientific evidence demonstrating the health risk of MMT was everything but solid. On the day of settlement with Ethyl, the Government of Canada embarrassed itself in issuing a statement that 'there is no new scientific evidence to modify the conclusions drawn by Health Canada in 1994 that MMT poses no health risk' (cited in Ethyl Corp., 1998a). That the environmental justification for banning MMT was dubious from the start can also be seen by the fact that the Canadian government could not ban the *use* of MMT under the Canadian Environmental Protection Act (CEPA). Instead it seems that the ban came largely about because of lobby pressure by car manufacturers who asserted that MMT would damage the emissions diagnostics and control equipments in automobiles. This impression is supported by an independent panel ruling from June 1998 on the suit put forward by the province of Alberta, which came to the conclusion that 'it was the automobile manufacturers who were the driving force behind the elimination of MMT' (cited in Ethyl Corp., 1998b). Because the environmental justification for the trade ban

of MMT was very shallow indeed, Ethyl's claim that Bill C-29 de facto expropriated its business in Canada seems not unjustified. Apparently, the Canadian government realised this and preferred to settle with Ethyl before the company would be awarded a potentially much higher compensation by an arbitration panel. The example of Ethyl Corp. versus Government of Canada does therefore not prove that governments cannot enact comprehensive environmental regulation. What it does demonstrate, however, is that discriminatory trade measures under the flimsy pretext and disguise of environmental protection can be successfully challenged under NAFTA and any multilateral agreement on investment with similar provisions.

Some problems with the draft MAI

Many of the misperceptions notwithstanding, the draft MAI suffered from a number of severe substantive and procedural problems that should be avoided in any new future attempt at the international regulation of investment:

- To start with the procedural problem, it has been a mistake from the start that negotiations took place at the OECD level. While a number of developing countries and economies in transition such as Argentina, Brazil, Hong Kong and the Baltic countries were allowed to sit on the table as observers, negotiations should have taken place under the auspices of either WTO or UNCTAD, where developing countries take part. This is because it was quite clear from the beginning that developing countries

were expected to accede to the MAI once negotiations were finished among the OECD countries. The draft treaty, for example, included a footnote to the relevant clause that send out a 'strong political message' to developing countries that accession to the treaty is 'welcome' (OECD, 1998a, 103). In this respect, the assertion by FitzGerald et al. (1998, 39) that the MAI merely 'represents the rationalisation of existing arrangements between OECD members — many of them bilateral in nature — with voluntary accession for other countries' is simply incorrect, as the vast majority of BITs are not concluded between OECD members, but between them and developing countries (UNCTAD, 1998b, 11-14). There is something fundamentally wrong with procedural fairness when an international treaty is negotiated in an exclusive club of members and afterwards the excluded are persuaded to accede.

- Connected to this point, the draft MAI did not include any clauses for the special needs of developing countries. To give one example: most developing countries use performance requirements in order to gain as much as possible from foreign investment. If the OECD (1998e) is correct in stating that 'foreign investment brings higher wages, and is a major source of technology transfer and managerial skills in host developing countries', then why should these countries not be allowed to use local employment requirements to enhance this transfer? Similarly, why should they not be allowed to require a certain amount of local content for production inputs when there is no evidence that such requirements distort the efficient allocation of resources and TNCs otherwise use mainly imported inputs (Balasubramanyam, 1998, 10 and 15)? Also, the draft MAI did not include

any clauses for the protection of the most vulnerable of developing countries. Many TNCs have higher sales than the GNP of a great many of these poor countries, so that they are at a comparative disadvantage relative to foreign investors and it is they who need protection from an international agreement rather than the investors.

- The biggest substantial problem of the draft MAI is to be found in two failures. The first is a failure to curb the socially wasteful investment incentives that are provided by competing host countries. The draft treaty text did practically nothing in that respect and Kodama's (1998, 34) assertion that 'the MAI's main purpose is to establish a stronger discipline on investment at the multilateral level' is only partially correct. The OECD negotiating parties did everything to establish disciplines on potential host countries with respect to measures that those could use to seize some of the profits of foreign investors. They did hardly anything, however, to establish disciplines on potential host countries to provide incentives to potential investors as the major beneficiaries of these incentives are the TNCs and their shareholders in developed countries.

  The second is a failure to ensure full investment neutrality. The draft MAI aspired to ensure that foreign investment is not discriminated *against*, but it did not ensure that host countries cannot discriminate *in favour of* foreign investment. In establishing absolute rights for foreign investors that need not be granted to domestic investors, a bias towards foreign investment was allowed and the principle of investment neutrality was violated. Again, it seems that the draft treaty failed to put these

kinds of discipline on host countries because their TNCs would benefit from favourable discrimination.

- Another major substantial problem of the draft MAI was its treatment of relatively volatile portfolio investment. Due to the broad definition of investment, portfolio gained the same protection and rights as foreign direct investment. The draft treaty text granted full transferability of 'all payments relating to an investment' (OECD, 1998a, 59). This transferability could be restricted in a financial crisis, but restrictions needed the eventual approval of the International Monetary Fund (IMF) (OECD, 1998a, 79f.).

A future international agreement on investment could go either of two ways: first, it could narrow the definition of investment and treat portfolio investment different from FDI. After all, the high volatility of portfolio investment flows can cause and exacerbate financial crises that trigger wider economic crises, when insufficient regulations allow portfolio investors to gamble recklessly or investors are seized by panic and pull their capital out of a country in massive amounts. This point is even acknowledged by prominent liberal economists like Bhagwati (1998) who are otherwise in clear favour of free trade in goods and services and FDI. The other way would be to strengthen and widen the temporary safeguards for dealing with balance-of-payments and other financial difficulties and to ensure that necessary regulatory controls on volatile capital flows do not clash with the obligations of a host country under the agreement. The financial crises in East Asia and Latin America that destroyed the welfare prospects of millions of people have led many to fear the conse-

quences of economic globalisation, but it would be a pity if this fear would extend to free trade and FDI as well, which are not to blame for these crises and, if anything, are likely to help regain the prospects of a better economic future.

Concluding remarks and the road ahead

Without having taken part, developing countries have already won the first round of negotiations on a potential future multilateral agreement on investment. Their bargaining power at either WTO or UNCTAD is naturally much higher than at the OECD. Here they can demand concessions from the developed world in terms of increased trade access to their markets or increased financial, technical, or institutional aid in exchange for granting substantially new rights for developed countries' foreign investors. Such a linking will also make more overall sense for two reasons: first, trade and FDI are obviously connected. For example, instead of directly investing in a country, a foreign company can also subcontract certain parts of its production process and import these goods and services. From the beginning, the OECD was the wrong forum for negotiations on multilateral investment rules not least because no linkage to trade issues could be undertaken. Second, assistance will be necessary for those developing countries which only get marginal inflows of investment so far to help them gain from the beneficial aspects of foreign investment. Virtually all empirical studies confirm that FDI enhances a host country's growth prospects, but most of them also demonstrate that in order to really gain from foreign investment a country needs to have already a minimum level of development together with the

accompanying stock of human capital (see, for example, Borensztein et al., 1998; Olofsdotter, 1998; de Mello, 1999) and needs an export orientation together with the possibility to actually export the goods it produces (for example, Balasubramanyam et al., 1996).

If negotiations on multilateral investment rules should start at some point at the WTO, negotiators must reckon to face hostility by the NGO community. The only viable strategy will be to keep the process open and transparent. In a world of globalised computer networks secretive negotiations have become difficult, if not impossible, as the OECD negotiators have learned the hard way. More generally, the major problems of the failed MAI draft, as indicated above, have to be addressed. To be successful, future negotiators must learn their lessons from the failed OECD-negotiations.

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Kurzfassung

MULTILATERALES INVESTITIONSABKOMMEN: LEHREN FÜR DIE WTO AUS DEN FEHLGESCHLAGENEN OECD-VERHANDLUNGEN

Ökonomische, politische und juristische Entwicklungen in den 90er Jahren veranlassten OECD-Mitgliedsstaaten im Jahre 1995 Verhandlungen über ein multilaterales Investitionsabkommen zu beginnen. Drei Jahre später scheiterten diese Verhandlungen. Wenn es auch interne Zwistigkeiten gab, so spielte der Widerstand gesellschaftlicher Gruppen doch eine entscheidende Rolle. Dieser Artikel untersucht die radikale Kritik von Nichtregierungsorganisation und die mehr qualifizierte Kritik von parlamentarischen Untersuchungsausschüssen am geplanten Abkommen. Es wird dargelegt, daß beiden eine Reihe von Fehleinschätzungen zugrunde liegt über den Abkommensentwurf. Im Gegensatz hierzu arbeitet der Artikel einige der wirklichen Probleme des Abkommensentwurfs heraus. Ein Verständnis dieser Probleme ist unabkömmlich, sollten die Verhandlungen über ein Investitionsabkommen zur WTO übergehen.