The Way to a Multilateral Investment Agreement

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ABSTRACT
Despite the large and growing importance of foreign direct investment (FDI), the international legal investment framework is highly fragmented. The contention put forward in this paper is that this situation is unsatisfactory because it creates transaction costs for multinational enterprises (MNEs) which range from the cost of legal advice to the cost of the uncertainty about rights and obligations. This paper points out a way to a future multilateral investment agreement by proposing answers to the following questions: (1) Which issues should be tackled on the multilateral level? (2) What are the optimal regulations for these issues from an economic perspective? , and (3) What is politically feasible?

KEY WORDS
FDI, MAI, legal framework, MNE

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1. Introduction

Despite the large and growing importance of foreign direct investment (FDI), the international legal investment framework is highly fragmented. The number of international investment agreements has increased sharply in the last decade. More than 2,300 bilateral investment treaties (BITs) and about 150 trade and economic integration agreements comprising substantive investment provisions have been concluded in this period. Another 60 or so agreements are currently under negotiation. The legal content of these agreements has also evolved significantly. International investment disputes have not only become more common, but the cases brought to dispute settlement have also become increasingly complex, creating various interpretations of their provisions and generating huge debates among governments, academics and practitioners (OECD, 2005). Accordingly, a growing body of jurisprudence and legal literature deals with the interpretation and implementation of the myriad treaties. This article deals with the necessity and the possibilities of a multilateral investment agreement, taking the Multilateral Agreement on Investment (MAI) as the starting point of the analysis.

The contention put forward in this paper is that the current legal situation is unsatisfactory for the following reason. International investment agreements (IIAs) are meant to be instruments for the promotion, protection and liberalisation of foreign investment. The basic idea is that FDI is an important source of capital and technology and consequently is considered a driver of economic growth. The current fragmentation of the legal framework creates transaction costs for multinational enterprises (MNEs) which range from the cost of legal advice to the cost of the uncertainty about rights and obligations. These transaction costs not only reduce the total amount of FDI, but also constitute an important source of distortions.
Furthermore, it seems reasonable to assume that an inscrutable and uncertain investment environment favours large firms with specialised legal departments and preferential access to governments. Thus, the current situation is a potential source of concentrations of power and rent-seeking activities with adverse consequences.

International investment is still subject to significant distortions. Specific rules included in a multilateral agreement aiming to remove, or at least to reduce, these policy distortions would increase world GDP. More liberalised markets for investment encourage competition and economic efficiency across and within markets, endorsing a broader dispersion of technology and capital. Consumers benefit from increased quality, wider choice, and lower prices on goods and services, while producers benefit from a level playing field, lower transaction costs and less uncertainty. What is more, international agreements may help to overcome powerful local constituencies and decrease the influence of local groups, which may have significant interests in protecting their often unproductive rents. A multilateral agreement would hamper rent-seeking activities, including bribery and corruption.

The aim is therefore to move from fragmentation to coherence. This raises three questions, or rather three groups of questions:

(1) Which issues should be tackled on the multilateral level?

(2) What are the optimal regulations for these issues from an economic perspective? and

(3) What is politically feasible?

Before speculating about the future, it is often worthwhile to look first at the past. Besides other attempts such as the Codes of Liberalisation or the Singapore issues within the WTO, the Multilateral Agreement on Investment (MAI) represents one of the most recent attempts to standardize the
international investment provisions. The Organisation for Economic Co-operation and Development (OECD) Council launched the negotiations with the mandate that the agreement should: “Provide for a broad multilateral agreement for international investment with high standards for the liberalisation of investment regimes and investment protection with effective dispute settlement procedures (OECD; 1995; p.2). Furthermore, the MAI treaty was almost completed when the negotiations came to an end and, thus, it provides a very useful tool to reveal which issues became generally accepted during the negotiations and which issues remain controversial. This paper will therefore take the MAI as a starting point from which to analyse the economic potential of an as yet nonexistent multilateral investment agreement and to identify the most significant potential deadlocks.

The remainder of this paper is structured as follows. First, we shall discuss the range of issues which should be covered in a future multilateral agreement. Second, we look at the content of the regulation concerning these issues. In the interests of brevity we shall focus on the definition of expropriation, treatment standards and dispute settlement. Finally, the main political problems faced by the MAI are discussed.

2. Which issues should be tackled on a multilateral level?

The range of investment issues which should be tackled within a multilateral agreement remains a controversial matter. The MAI negotiations have shown that the most contentious issues are the scope of the future agreement, and whether it should include provisions concerning performance requirements, investment incentives and taxation.
The definition of “investment” represents the first important hurdle in the negotiation of an investment agreement. Should the liberalisation and protection clauses within the agreement apply only to specific forms of investment (e.g. only FDI), or should the agreement cover all forms of capital movement? According to general economic theory, all forms of capital movement should be liberalised. The free movement of capital allows the limited resources to be invested where the returns are highest and, therefore, increases allocative efficiency.

In the case of the MAI, the delegations argued in favour of an open, asset-based definition of investment, which covers all forms of investment including contractual assets and the products of the investments. Accordingly, an investor was defined as any natural or legal person of a contracting party, including permanent residents. Combined with the indirect ownership of the definition of investment, an investor could have been almost anyone, and it is difficult to imagine a broader definition (OECD, 1997b, p.9). However, this exhaustive definition of the term “investment”, which would have allowed the scope of the MAI to be adapted to the changing nature of international investment, faced significant resistance from a number of delegations (OECD, 1998b, p.11).

Besides the political opposition, there was also resistance by (liberal) economists concerned about the full liberalisation of investment flows. In particular, short-term capital flows were considered to augment the risk of balance of payment problems and financial crises. Unfortunately for the proponents of the agreement, the MAI negotiations took place during the Asian crises. The financial crisis from 1997 to 1999 in south-east Asia represented “the strongest financial panic since the Great Depression” (OECD, 1999, p.5). Kurtz (2003, p.760) wrote: “Against these dramatic changes in the global economy, the prospects for the MAI as a treaty which aimed to liberalize all forms of capital flow looked less certain.” While temporary safeguard measures concerning serious balance of payments
difficulties have been negotiated, medium- and long-term measures to control short-term capital flows have not been considered (Picciotto, 2000, p.3). However, it is important to keep in mind that the exact causes of financial crises remain unknown despite extensive research, and that, as Krugman and Obstfeld (2000, p.714) point out, capital controls avoid a restructuring of weak regulatory systems and represent moreover a “potent source of corruption”.

A second important hurdle is whether to include performance requirements and investment incentives. In an optimal world with no market distortion, the best policy practice would be no policy at all. Unfortunately, markets are not perfect and their regulation may be desirable from an economic perspective. Rodrik (1987), for instance, found that the net welfare effects of export-performance requirements may be positive. A multilateral agreement imposing restrictions on the use of such measures could thus improve the welfare of capital-exporting countries by increasing the returns of MNEs, but would simultaneously, at least in the short run, reduce the host countries’ welfare. In general, however, performance requirements tend to render the global economic efficiency suboptimal. On the national level Moran (1998) finds that most performance requirements in developing countries have actually retarded their development by increasing investment costs and because investors may be deterred from investing in the country in question. Furthermore, performance requirements imply a shift of the benefits from one group to another which causes rent-seeking and favours corruption. For example, local content requirements may well benefit input suppliers, but at the expense of final good producers which are confronted with higher prices and less choice.

While the WTO Agreement on Trade Related Investment Measures (TRIMs) is applicable only for local content requirements and trade balancing requirements, the MAI would have regulated the use of the following performance requirements:
- trade related performance requirements such as ratio of exports to total sales,
- domestic content,
- local purchases,
- ratio of imports to exports, and
- ratio of local sales to exports.

Moreover, under the MAI governments could not have obliged investors to transfer technology to locals, to locate their headquarters in the same country, to spend a certain amount on development and research, to engage a certain ratio of locals and to participate with a minimum or maximum level to the equity (OECD, 1998a, p.18).

However, the regulation of performance requirements within the MAI was significantly diluted by an additional clause which stated that with the exception of the trade related performance requirements, parties may impose performance requirements only if linked to granting of advantages. Graham (2000, p.62) notes that, in general, the existing performance requirements in the OECD countries are linked to investment incentives and would therefore not have been banned by the MAI. Non-governmental organisations (NGOs) opposed the prohibition of performance requirements which, in their view, erode the regulatory capacity of host countries. This resistance stands in contrast to the fact that “no OECD country generally imposed performance requirements on foreign direct investors as a condition of entry or continued presence” (Graham, 2000, p.63).

The issue of investment incentives is closely linked to performance requirements. The issue had been removed from the MAI agenda in the 1998 draft text in order to increase the chances of a consensus. However, incentives, in particular, are known to be a source of considerable market distortions and would thus have been one if not the most important issues at stake.
Although it is difficult to evaluate the benefits of FDI, the increasing competition for inward investment between nations in the face of the growing mobility of MNEs pushes governments not only to violate basic concepts concerning the distribution of wealth, but may create considerable financial costs for governments. The creation of one job may cost taxpayers unjustifiable amounts. In the late 1990s, for instance, the United States spent US$ 200,000 on the creation of one job (Moran et al., 2005, p.382). The result of this excessive bidding is known as the “winner’s curse” and may result in a race to the bottom. Therefore, incentives are often compared to the well-known “prisoner’s dilemma” – a situation where unilateral measures do not lead to a Pareto optimum. In such cases, a supra-authority has the potential to enhance individual benefits for every actor. That is exactly what the MAI stands for: to lift the regulations out of the national legislation into the sphere of a multilateral framework.

As stated by Daly (1997, p.799), “tax and non-tax incentives for FDI constitute a potentially serious distortion to the international allocation of capital without necessarily increasing its global supply.” While traditional analysis could find no significant influence of tax incentives on foreign investors, and competition between production sites in developed and developing countries was supposed to be almost nonexistent, contemporary empirical analysis shed another light on this issue. Mutti (2003), for example, shows that over the past decades the responsiveness of international investors to locational incentives has grown. The MAI, however, has shown that even in the presence of a strong economic case in favour of the multilateral regulation of investment incentives, the implementation of such rules remains very difficult. To avoid a future situation in which real-politics continues to triumph over economics, the first step should only intend to establish more transparency and only at a later stage to restrict the competences of the local authorities in federal countries. Furthermore, to
establish effective rules against investment incentives, not only the financial, but also fiscal, and other instruments would have to be restricted as well.

Let us now turn to the issue of taxation. While under Article I of the GATT agreement, the MFN treatment has to be applied to tariffs and border taxes and, under Article III, the National Treatment (NT) to internal taxes on goods, provisions regulating double taxation have traditionally only been introduced in bilateral agreements because of their reciprocal characteristics. However, to apply the concept of non-discrimination to taxation systems within a multilateral framework would not have presented technical difficulties comparable to the regulation of double taxation. Rather, the problem seems to be political. In the early 1990s, even in the United States neither NT nor MFN treatment found its application in the domain of taxation. As Daly (1997, p.795) indicates, inward FDI in the United States had faced an average tax rate of 7.5 per cent, while domestic investments were taxed at only 5.8 per cent. FDI from the UK was taxed at 6.4 per cent and tax rates for Portugal reached 13.2 per cent. In a survey done by the European-American Chamber of Commerce, 42% of the European-owned firms in the United States felt themselves discriminated against, and that American firms had a better deal with regard to taxation. It is therefore not surprising that the European Commission pushed for inclusion of this issue while the United States remained “sceptical”.

In May 1997, the MAI negotiations had not been accomplished according to plan and a consensus remained far out of reach. To limit the number of controversial issues, the non-discrimination rules concerning fiscal treatment disappeared from the MAI text, as “fiscal experts have identified a number of problems that would arise if the MAI were in its entirety to apply to taxation” (OECD, 1997a, p.23). Taxation issues would have found their way into the MAI text only in a handful of cases such as the provision against creeping expropriation and the transparency clause, which ensure that investors are fully informed about the fiscal policy. This could not prevent
concerns that the MAI text might be eroded by discriminatory taxation (Daly, 1997, p.798).

3. What are the optimal regulations for these issues from an economic perspective?

Probably the most important reason for concluding a multilateral investment agreement is that it offers better protection to investors. The protection of foreign investment against expropriation is a common clause in BITs and derives from the fact that foreign affiliates are subject to the host countries’ jurisdiction. Prior to the 1980s, decolonisation and the socialist movement challenged the property rights of investors. Today, the historical and ideological motivations have changed and the tendency to expropriate has decreased manifestly (UNCTAD, 2004, p.28). Currently “only” around 60 per cent of FDI stocks invested by OECD countries in non-OECD countries are protected by international investment agreements (IIAs) (OECD; 2005, p.2). It should be noted that these 60 per cent do not include the protection of short-term capital flows.

Under the MAI, the foreign investors would have been protected by the expropriation clause, which – similar to the Hull formula\(^1\) – imposes prompt, fully convertible and transferable compensation of fair market value for any nationalisation (OECD, 1998a, p.35). Furthermore, protection would have included indirect expropriation (or regulatory takings). While the Hull formula itself was well accepted, its application to indirect takings was a highly controversial issue. The definition of the frontier line between regulations in the public interest and regulations for the purpose of discriminating against foreign investors would have again been similar to

\(^1\) In the opposite, under the Calvo Doctrine, which resulted from the independence movement of the Latin American Countries in the nineteenth century, compensation had only to be “appropriate” and dispute settlements were required to be settled exclusively in the host state.
NAFTAs Chapter 11 provision, delegated to the judicial power. Arbitral cases under NAFTA\(^2\) suggest that the uncertainty over how indirect takings ought to be interpreted remains considerable, as does the controversy about the introduction of indirect expropriation into agreements.

NGOs have often raised the criticism that the regulation of indirect expropriations seriously limits the ability of governments to enact and implement new legislation on environmental issues and in other fields. The combination of this enhanced protection of investors with efficient investor–state dispute settlement was perceived as an attack on national sovereignty. Governments would abstain from certain desirable regulations, it was argued, due to the uncertainty linked with the interpretation of indirect expropriation and the potentially significant financial consequences for governments. The empirical research on this topic is inconclusive. A significant body of literature argues that despite the incisive wording of investment agreements, their application does not often impose significant constraints on national sovereignty (for the case of NAFTA, see Van Duzer, 2002). On the other hand, the concerns about the loss of sovereignty of the governments is supported by Picciotto and Mayne (1999), for example, who predict that the MAI would destabilise and weaken national regulation capacity, and thus, weaken rather than support measures intended to ensure that investment is directed towards sustainable development. Similar the French Government declared that the MAI would represent a serious threat to the sovereignty of the states (Lalumière and Landau, 1998, p.2). The Ethyl case under NAFTA, which came into force in June 1997, provided support for these concerns. The Canadian Government, which stopped the importation of the chemical additive MMT, which had been linked to nerve damage by a number of studies, paid US$ 13 million to the American Ethyl Corporation and re-allowed its importation.

\(^2\) For an extensive interpretation see ICSID Award, Metalclad v. United Mexican States, Case Number ARB (AF)/97/1, August 30, 2000.
However, a closer look at this case reveals that the Canadian Government did not prohibit the sale of locally produced MMT, but only the importation of MMT. Therefore, the NT principle, the performance requirements, and the expropriation provision of the NAFTA were clearly violated. In other words, the Canadian government tried to limit imports under the pretext of public health regulation. Thus, the concerns that arose out of the Ethyl case are not justified.

Another source of conflict, which is related to expropriations, arose from the Helms-Burton Act. The Cuban Liberty and Democratic Solidarity Act, known as the Helms-Burton Act, were signed by President Clinton in 1996 during the ongoing MAI negotiations. This act aimed to combat the international sale of expropriated assets previously owned by foreigners which had not been compensated correctly. While this issue represented an important domain to be regulated, the unilateral way in which the United States decided to regulate this issue “placed a cloud over the MAI negotiations that, according to some negotiators interviewed by this author, never fully dissipated” (Graham, 2000, p.29). The Helms-Burton Act allowed, for example, US citizens to claim against foreign companies investing in expropriated assets in Cuba (later expanded to Libya and Iran by the Iran-Libya Sanction Act) and to impose sanctions on such companies by denying entry into the US to their key executives and shareholders, as well as their families (Schaub, 2004, p.21).

Particularities of the approach taken within the MAI are the NT principle and the MFN treatment principle. While the NT principle obliges governments to treat foreign investors “no less favourably” than domestic investors in like circumstances, the MFN treatment guarantees that a foreign investor will be granted treatment “no less favourable” than the treatment which is accorded to an investor from another contracting party. Their “relative” character does not aim to obstruct countries pursuing their own foreign investment policies, but to forbid discrimination against foreign
investors. Both treatments applied to the pre- and post-establishment phase included in a multilateral agreement would have represented a large step forward on the way to liberalised markets (OECD, 1997a, p.18). However, the combination of the top-down approach with the national treatment applied to the establishment of investment spawned myriad country-specific exceptions and showed the limited intentions of countries to liberalise investment. Moreover, no agreement could be reached to apply a “ratchet effect” to the exceptions during the MAI negotiations (OECD, 1998c, p.60).

Economic Unions, such as the EU, would have liked to liberalise faster for internal investors than for the other investors and to avoid “free riders”. While the Codes of Liberalisation allowed EU Member States to liberalise more rapidly or more widely among themselves without extending these measures to all OECD countries, the preferential treatment of Member States would have violated the MFN treatment clause. Therefore, the EU insisted on the introduction of the REIO (Regional Economic Integration Organisation) clause arguing that the advanced market access of its Members would be linked with obligations such as the acceptance of foreign diplomas and majority voting. To extend the benefits only to the non-members in such circumstances would have been difficult to justify (OECD, 1998b, pp. 14-15). Although regional investment agreements distort the world economy much less than regional trade agreements do, some delegations thought that this proposal struck at the very objectives of the MAI (Canner, 1998, p.667). The United States, for instance, was strongly opposed to the introduction of the REIO because it was more afraid of a major wave of protectionism in European policy than of the loss of benefits resulting from the application of the MFN clause to the NAFTA-Members (Graham, 2000, p.31 and 59).

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3 Similar to Article 58 of the Treaty of Rome, regional investment agreements include a broad definition of “investor” which allows foreign firms to receive national treatment as long as they operate through one of their affiliates located in the region.
Granting investor rights must be coupled with efficient and independent dispute settlement mechanisms. Besides a state–state dispute settlement, the MAI would have included an investor–state dispute settlement mechanism. Once attempts to settle disputes between a foreign investor and the host State by negotiations or consultations had failed, the investor would have been free to press charges against the host State. The investor could plead to any competent court under the World Bank Group’s International Centre for Settlement of Investment Disputes (ICSID), the ICSID Additional Facility, the Arbitration Rules of UNCITRAL or the ICC Rules of Arbitration. The MAI text allows investors to choose a tribunal other than one of the abovementioned tribunals under the condition that the parties had agreed on this before the dispute arose.

The investor–state disputes settlement provision was one of the most controversial issues of the MAI. The corresponding provisions within the NAFTA have been criticised for lack of transparency as there is no provision for mandatory public access to the litigation documents. While ICSID cases are notified in a public registry, UNCITRAL lacks even this basic requirement (Cosbey et al. 2003, p.10). Thus, transparency depends on the access to the legal documents that Member countries offer. Especially in the case of Mexico, there is still no guarantee of obtaining such access. “Even under the ICSID arbitration system, the decisions of the tribunals have not been made public” (UNCTAD; 2005, p.13). Furthermore, it was argued that the investment dispute settlement provisions favour only the “big multinationals”. Effectively, the average legal costs are estimated at up to US$ 0.5 to US$ 1.5 million for lawyers’ fees and US$ 400,000 or more for the tribunal costs (UNCTAD; 2005, p.15). As far as the authors are aware, insurance for small companies for legal protection does not yet exist.
4. Reaching a consensus: What is politically feasible?

Reaching a consensus includes both, a well-balanced agreement and an efficient environment for negotiations. The benefits of a multilateral investment agreement should be distributed fairly between the different interest groups. In particular, a fair distribution of the benefits between developed and developing countries, producers and consumers (consumer groups and NGOs), and between employers and employees (unions) must be reached. While developing countries and NGOs were officially excluded from the negotiations, the communication to and from the Trade Union Advisory Committee (TUAC) located at the OECD headquarters in Paris did not allow for the necessary representation of the employees. Thus, the resulting MAI text showed a “conception of the agreement as a pure investor and investment protection instrument” (Muchlinski, 2000, p.1049) biased in favour of the MNEs. While the MAI included important rights for foreign investors, obligations concerning their behaviour would have been introduced only in the form of soft law. Cosbey et al. (2003, p.24) note: “Many observers are concerned, understandably, with the provision of legal rights but only voluntary obligations.” Future multilateral investment agreements need to take all the interests at stake into account in order to be politically viable. Not only the Member countries’ delegations, but also NGOs, worker unions, the MNEs and the other interest groups must be able to reach an agreement on the provisions.

In other words, the provisions need to meet an incentive compatibility constraint. The basic idea is simple: In order to make sure that a multilateral agreement is approved, every participating party has to be convinced that their overall net payoff will be positive during the period the agreement stays in force. However, two main difficulties arise in practice. First, only the representatives of the Member Governments are official negotiating parties. They are, however, strongly influenced by business communities, the labour
unions and NGOs. To identify the extent to which each group has to be satisfied in order to achieve a consensus on the national level is a very difficult task. Furthermore, the theory of collective action (see, for instance, Olson, 1971) tells us that stakeholders which are not well organised tend to lose out in such a bargain. Second, to evaluate the benefits arising for the different parties represented an almost impossible task. It is not surprising, that: “To the authors knowledge, no one, not even the analytical orientated Secretariat of the OECD, has made a rigorous attempt to estimate the magnitude of the benefits that the MAI might have created” (Graham, 2000, p.3).

To gain the support of the business community, a future agreement should provide stable conditions and legal certainty for long-term commitment of resources, ensure broad coverage, provide market access and set the stage for further liberalisation (Geiger, 1998, p.473). However, these rights should be accompanied by binding obligations for investors. As Muchlinski (2000, p.1049) notes, “there has been a transformation in political discourse, which challenges not the legitimacy and value of free private enterprises as such, but its legitimacy as a polluter, an abuser of market power, a corruptor of state officials, an exploiter of workers, and a potential accomplice to violations of fundamental human rights.” A future multilateral investment agreement should include internationally agreed standards for business. Picciotto (2002) enumerates explicitly standards which combat bribery and illicit payments, regulate corporate governments and disclosure requirements and impose restrictions on the marketing of products such as drugs tobacco or baby food. Further, similar to the TRIPS agreement, which enforces through a positive linkage a minimum level of intellectual property protection, minimum social and labour standards could be introduced into or at least linked to the MAI as well. By doing so, investors’ rights would be balanced by their acceptance of responsibility (Picciotto, 1998, p.7). Besides the Code of Conduct for Multilateral Corporations other standards that
already exist in the domain of environment, human and labour rights and anti-corruption standards could be adapted and transformed into binding regulations. Host States should also keep certain rights, especially the right to enact bona fide regulations in the public interest. A proposition to introduce an article 3 “right to regulate” into the MAI text was made (OECD, 1998c, p.14). However, the article would have been largely meaningless, as it applies only to measures consistent with the MAI (Kurtz, 2003, p.772).

The draft text of 1998 specifies that the MAI is open to all countries. Although only a limited number of developing countries were expected to request accession to the MAI during the first decade, the benchmark-effect may have reduced the flexibility of these countries in the conclusion of bilateral and regional agreements. A bias of the MAI in favour of the developed countries due to the exclusion of the developing countries from negotiations would have influenced all developing countries either directly or indirectly. While foreign investors in developed countries are generally considered disadvantaged compared to the established local firms (pioneering: Hymer, 1976), in the case of developing countries the reverse may be true.

As a result, “there exists a potential danger of regulatory competition between poor countries leading to a lowering of standards” (Fitzgerald et al., 1998, p.14). Future negotiations should take the particularities of their economies into account, especially their vulnerability to pressure from powerful home States or from large MNEs. Therefore, certain minimal standards concerning environmental and health regulation ought to be introduced in a multilateral investment agreement. Since this topic became part of the negotiations only shortly before the MAI was abandoned, little is known about its political acceptance.

The limited capacities of a considerable number of developing countries to adapt to sudden changes in the world economy due to their limited
regulatory institutions may be another problem. It is uncertain whether the benefits dominate when developing countries follow an unfettered path of liberalisation (Moran et al., 2005, p.375). The recommendations for developing countries therefore tend towards an opening combined with increased national regulation. Bhagwati and Dunning argue that globalisation should not reduce the role of governments. “Rather, I consider that governments should realign the incentive structures and enforcement mechanisms over which they have control or influence so as to ensure that the wealth creating organizations within their jurisdiction can fully exploit and capture the benefits of globalization, while satisfying the localized needs and aspirations of their constituents” (Dunning, 2005, p.163).

The second important point to consider is the negotiation environment. The MAI negotiations took place within the OECD. Since its foundation the OECD has been embedded in a tri-partite consultation structure including the member governments, the employees, and employer representatives at the global level (Tieleman, 2000, p.6). However, this novel and progressive approach to include the BIAC (Business and Industry Advisory Committee) and the TUAC in the negotiations did not fulfil its purpose. Critics were of the opinion that the MAI friendly position of the TUAC was not representative of the interests of the majority of the employees and that it would not sufficiently distribute the information within the internal networks (Lalumière and Landau, 1998, p.2). Similarly, BIAC stated that it was difficult to gain the support of the business community for an agreement that appeared to be in constant flux, since the internal channels of BIAC allowed information to circulate only slowly within the business community. The involvement of the business sectors therefore remained very limited (Tieleman, 2000, p.10). As a result, the opposition to the MAI by the NGOs was not sufficiently compensated by a counter effort let by the business groups and associations, which had worked hard to help to bring the Uruguay Round and NAFTA negotiations to a successful conclusion.
The reason for their “indifference” may have been that “the potential value of the MAI […] was positive, but too small to warrant much attention” (Graham, 2000, p.10). In a future agreement the business community has to regain its leading position in negotiations. This implies that MNEs are aware of the potential benefits of the channels of communication within the BIAC which allow for a rapid and flexible response to the changing nature of negotiation.

Another significant improvement concerning communications would have to be achieved in the way a future MAI is negotiated. The MAI negotiations have shown that NGOs can no longer be excluded from important international negotiations. The MAI negotiations was the beginning of a new era for NGOs, which transformed from a set of scattered groups to a “unified” negotiation partner linked by the Internet. Their growing influence was highlighted by the fact that they were finally invited to participate in the negotiations (Lalumière and Landau, 1998, p.4). Views on the results of this participation diverge. While some note that the NGOs with their different approach introduced important new aspects (see Geiger, 1998, p.470), views on the role of the NGOs are mostly critical. Graham (2000, p.13) even compares the NGOs with primitive gatherings of people who are beating drums only in search of conflicts. Nevertheless, civil society should be officially involved in negotiations in an advisory capacity. For Kobrin (1998, p.99) “the days of negotiating treaties behind closed doors are numbered, if not over”. Therefore, to exclude NGOs from future negotiations would not only discredit the agreement in the eyes of the wider public, but would constitute a missed opportunity to democratise global governance (Tieleman, 2000, p.18).

While the MAI text was always accessible, the NGOs wanted a continuous supply of information from the very beginning of the negotiation process. A
principle–agent problem is inevitable in the negotiations of international agreements led by informal groups of specialists but it may be reduced by a high level of transparency. A similar argument was put forward by the French Government, which declared that the governments could not fulfil their political responsibility due to the organisation of the negotiations and the limited communication with the Ministers of France (Lalumière and Landau, 1998, p.3). Whereas the French Government points out the risk that specialists working on a sub-domain of the agreement may overlook the overall outcome of the combination of the separate parts, Picciotto (1998, p.3) goes even further and considers specialist groups to operate within strong professional ideologies, which may result in a further deviation of the resulting agreement from the “common interest” of a state.

It can be concluded that it was rather ironic that an agreement asking for more transparency from governments was negotiated under such conditions and that the lack of transparency simplified the task of the NGOs. Under these circumstances, it was relatively easy for the NGOs to gain public support and to exert a significant influence on the development of the negotiations. “The initial lack of attention to the public opinion, and to the views of civil society, created an air of hostility to the project that made it hard to justify on a political level” Muchlinski (2000, p.1040). Today, the secretary general of the OECD concedes that a “strategy on information, communication and explication” is necessary (Kobrin, 1999, p.106). An illustrative example for this “new” strategy is the policy framework for investment recently launched by the OECD (OECD, 2006).

5. Conclusion

The MAI’s core principles aimed to eliminate the remaining barriers to investment within OECD countries and later the barriers in the non-OECD
countries which would have joined the agreement. The multilateral approach has significant advantages over bilateral treaties and regional agreements, as it provides a level playing field for all firms, independent of their origin, and, consequently, improves allocative efficiency. Furthermore, the protection provisions within the MAI would have limited the discretionary powers of governments and, therefore, the MAI would have decreased the influence of interest groups. For these reasons, we believe that as many issues as possible should be regulated on a multilateral level. However, it is also necessary and economically desirable for governments to keep certain regulatory powers. Basically, an issue should be regulated on the multilateral level if and only if fragmented regulation causes important distortions, or if there is a prisoner’s dilemma. Further and more systematic research is necessary to decide which issues fulfil these criteria.

Turning to the material provisions, we have found that lawmakers face a trade-off between protecting the interests of investors and the interests of the host States. An illustrative example is the definition of expropriation, where investors prefer a broad definition which limits the sovereignty of the host State. In this discussion, we believe, it is important to keep the importance of FDI for national competitiveness in mind. FDI is an important source of technology, know-how and labour skills, and what is good for investors is therefore good for the national economy. Nevertheless, the government has important tasks and is also a driver of competitiveness. Striking a balance between these two aspects is a daunting enterprise, but the potential gains make it a very rewarding one.

From a political perspective, signing a multilateral agreement amounts to granting an advantage to one group to the disadvantage of another. History has shown that the resulting political opposition can only be overcome by the support of political leaders at the top government level. Graham (2000, pp.17-18) notes that while the Uruguay Round and the NAFTA negotiations benefited of the commitments of the US presidents then in office, the
political leaders of most participating countries played a minor role in launching the negotiations. In the case of the MAI, most specialists did not have preferential access to higher-level officials who had the potential for breaking the negotiations deadlocks. The recommendation made here is not to compensate a lack of conclusive theoretical and empirical evidence, by ideological persuasion. The point is that globalisation is often perceived as a threat by the general public. The early announcement by charismatic leaders of their public support may increase the confidence of the population in the potential gains and in their ability to compete internationally. However, after almost a century of failed attempts to negotiate a multilateral agreement, and because of the increased influence of NGOs, it has become increasingly risky for politicians to express public support for such an agreement. Furthermore, the support of the top leaders by the national MNEs seems to have been too small to compensate for the risk of losing the support of numerous NGOs in future elections.
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Table 1: Key controversies

<table>
<thead>
<tr>
<th>Agreed Issues</th>
<th>Controversial Issues</th>
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<tbody>
<tr>
<td>Wide definition of “investment” and “investor” including the pre- and post-establishment phase of investment</td>
<td>The introduction of:</td>
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<td></td>
<td>- intellectual property</td>
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<td>- capital investment flows</td>
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<td>- open definition</td>
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<td>The national treatment (NT) and the most-favoured nation treatment (MFN)</td>
<td>Application of NT to the pre-establishment phase combined with a top-down approach</td>
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<td>caused a significant number of country-specific exceptions</td>
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<td>General exception of cultural issues</td>
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<td>Performance requirements</td>
<td>Special treatment for developing countries</td>
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<td>Protection against direct takings</td>
<td>Protection against indirect takings and <em>bona fide</em> regulations</td>
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<td>Helms-Burton Act</td>
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<td>State–state and investor–state dispute settlement provisions</td>
<td>Transparency</td>
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<td>Taxation and incentives</td>
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*Source: Authors’ elaboration*