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NGOs, Business, and International Investment: The Multilateral Agreement on Investment, Seattle, and Beyond

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Until the 1990s, the General Agreement on Tariffs and Trade (GATT), predecessor of the World Trade Organization (WTO), facilitated international trade negotiations with relatively little attention from the international media. Of course, there were controversial aspects of previous rounds, such as agriculture in the Kennedy Round in the 1960s and subsidies in the Tokyo Round in the 1970s, but these were either confined to particular sectors or were relatively arcane matters from the point of view of the general public.[1] Officials at GATT, an obscure and small institution based in Geneva compared to the International Monetary Fund (IMF) and World Bank, could assume that their relatively uncontroversial status in the developed countries would persist.[2] The main domestic opponents of trade liberalization rounds in the 1950s and 1960s were uncompetitive sectors. Where firms and unions in such sectors were politically organized, they were typically bought off with sectoral exceptions or new forms of protection.

Today, things could hardly be more different. At the Seattle ministerial meeting of the WTO in November 1999, government negotiators were besieged by media coverage and protestors representing thousands of nongovernmental organizations (NGOs) opposed to the envisaged Millennium Round negotiations. Suddenly, international commercial policy negotiations[3] had become high drama, and the WTO was at least as controversial as the IMF.

This new situation is most immediately threatening to proliberalization business lobbies, which, over a series of postwar GATT rounds, came to form a close and collusive relationship with government policymakers of the major developed countries. In short, these business groups fear that the "politicization" of international commercial negotiations, and the associated demands by many NGOs for inclusion in them, threaten the very basis of the postwar structure of gradual international economic liberalization. NGO critics,[4] however, argue that the

WTO and similar organizations (and indeed the governments of major developed countries themselves) have been captured by big business and that they must be either radically democratized or stopped altogether. Thus, we may have arrived at a fundamental crossroads in global economic governance.

This article addresses two main questions that follow from the above. First, do NGOs now have the power to derail traditional approaches to and existing practices in international economic governance? And can they go further to influence the shape of the international commercial policy agenda? Second, is the trade-off between the "workability" of international commercial policy negotiations and their greater "democratization" as severe as big business and many governments claim? What prospects are there for integrating NGOs into the policymaking process, and how should this be done?

The focus of the discussion that follows is on the negotiations for a Multilateral Agreement on Investment (MAI) in the mid-1990s. It is argued that the MAI was a watershed for the following reasons. First, it is difficult to understand NGO opposition to the Millennium Round agenda in Seattle in 1999 without addressing their opposition to and mobilization against the MAI. The strong and not wholly mistaken perception of many NGOs that international business lobbies would simply transfer the investment rules agenda from the Organization for Economic Cooperation and Development (OECD) to the WTO was an important factor in mobilizing opposition in Seattle.[5] A second reason is that the MAI negotiations were conducted under the auspices of the OECD in Paris, in part because of the expectation that this would be a low-profile and uncontroversial venue for such talks. This expectation proved disastrously mistaken. Prior to the MAI, the OECD enjoyed perhaps an even lower public profile than GATT, but the OECD suddenly became the object of much hostile NGO and media attention. Arguably, the lessons of the MAI for the Seattle WTO meeting could have been learned but were not.

To prefigure the argument, the basic reason for NGO opposition to both the MAI and the next WTO round is the NGO belief that government policies and negotiating strategies have been captured by the big corporate lobbies in the major countries. As my analysis of the MAI case suggests, there is substantial evidence in favor of this claim, especially for the United States. The origin of the MAI and the negotiating strategy associated with it was a product of the privileged position of internationally oriented business lobbies in the U.S. commercial policy process and their ability to push a bargaining agenda at the OECD that largely reflected their preferences. This is not especially surprising,

given the way that international commercial liberalization has been based on the principle of reciprocal market opening.

If the MAI was the logical culmination of this policy structure, its shape was such as to provoke widespread concerns among NGOs and local communities about its possible consequences for other areas of policy. This exposed a major weakness in the structure of commercial policymaking. Particularly in the United States, the ratification of international commercial liberalization agreements before the 1990s was largely dependent on the mobilization of protrade business lobbies against sectoral, protectionist interests. Opposition to the MAI, by contrast (as also, but to a lesser extent, to the North American Free Trade Agreement [NAFTA] in the 1990s), was of a much broader and more diverse variety than traditional sectoral protectionist groups. This posed a fundamental difficulty for the government-business strategy and made the collapse of the negotiations inevitable (even if this was not the only reason for their collapse).

Moreover, because major business lobbies will continue to demand in one form or another the kind of liberalization envisaged in the MAI, this poses a fundamental challenge to the prospects for future WTO rounds. Seattle was arguably the first casualty of this new politics of commercial liberalization, and it would be wrong to put down its failure only to inadequate preparation and coordination by major governments and business lobbies. Many have argued that the major international institutions, notably the WTO, must open up to NGO participation and thereby "democratize" international commercial policy. While this may have some benefits, it does not address the basic problem of the growing gap between the domestic politics of agenda setting and the politics of ratification in the major countries. Governments need to find new ways of integrating nonbusiness groups into the domestic process of agenda setting in commercial diplomacy. Because global investment flows are likely to continue to grow rapidly even without the MAI (or any related agreement within the WTO), both NGOs and business have a strong interest in a future international investment regime and in a strong WTO.

The structure of the article is as follows. The first section outlines the nature of commercial policymaking in the postwar period, focusing on the United States as the most important case. The second section outlines the origin of the MAI agenda in U.S. business lobby activities in the wake of the Uruguay Round, and why business lobbies subsequently lost control of and interest in the negotiations. The third section asks whether the NGO opposition to the MAI was unique, or whether it was symptomatic of a deeper problem in international commercial

policymaking. The conclusion asks how the political problems raised by the new international commercial policy agenda might be addressed.

The Political Economy of Postwar Commercial Policymaking

The interdependence literature of the 1970s tended to be fairly agnostic about whether certain kinds of nonstate actors were more influential in world politics than others, though multinational corporations (MNCs) were most authors' favorite example.[6] Many of the same themes are taken up in current globalization literature, some of which has gone further to suggest that transnational nonstate actors, and particularly global firms, are displacing states in global politics.[7] A popular strand of this argument is that technological change and economic liberalization have increased the mobility, and thereby the political power, of business and financial actors compared to immobile territorial states, citizens, and social groups in general.[8]

However, it is important to recognize that internationally oriented business, before the advent of "globalization," has long played a central role in the commercial policymaking process of the major countries. In practice, most governments did not rely heavily on orthodox economic welfare arguments in favor of international trade in goods, services, and assets to sell reciprocal liberalization deals domestically. GATT in particular, based as it was on the negotiation of "reciprocal" trade liberalization, implied that governments relied mainly on the mobilization of export-oriented business lobbies to counter domestic protectionist opposition (usually from sectoral firms and unions) to successive negotiating rounds. These protrade business lobbies were expected to sell the benefits of foreign (not domestic) liberalization to politicians who were naturally concerned about corporate failures and job losses in uncompetitive sectors. Over time, it became more and more important to involve protrade business lobbies in setting the agenda for negotiation, so as to ensure a coherent national negotiating position and to identify areas where national concessions would be most difficult. Moreover, it helped to ensure the support of protrade lobbies in postnegotiation domestic ratification.[9] Nowhere was the process of government-business consultation very transparent or "democratic."[10]

In the U.S. case, such business influence was institutionalized in the 1974 Trade Act, which established a private sector advisory system to ensure that trade policy was reflective of "U.S. commercial and economic interests." The Department of Commerce and Office of the United States Trade Representative (USTR) established (and co-chaired) seventeen Industry Sector Advisory Committees (ISACs) and four Industry

Functional Advisory Committees (IFACs). The somewhat precarious position of USTR (which has overall responsibility for the coordination of commercial policy) in the policymaking structure in Washington and its limited resources contributed to a growing reliance on business input. Section 135(c)(2) of the 1974 act required these committees to "be representative of all industry, labor, agricultural, or service interests (including small business interests) in the sector or functional areas concerned." USTR and the Commerce Department have interpreted this clause narrowly. As late as March 1999, calls for new nominations to these committees required nominees to be "U.S. citizens representing U.S. manufacturing and service firms that trade internationally or an industry association whose members are primarily U.S. owned and are involved in international trade." Moreover, "foreign companies, non-government organizations, and academic institutions" were specifically excluded as ineligible.[11]

This injection of business preferences into the policy process also enables ongoing contact between government and business during international negotiations. It also provides political cover for members of Congress, who must ultimately ratify trade (and trade-related) agreements. In addition, broad industry groupings of protrade firms such as the Emergency Committee for American Trade (ECAT), the U.S. Chamber of Commerce, and the Business Roundtable have played an important role in cultivating congressional support in the final ratification process both for multilateral agreements and for regional deals like NAFTA.[12] Another role of such broad groups, whose memberships include firms represented on ISACs, is to take a higher profile in the media than can the ISACs or IFACs. It is worthwhile emphasizing that although groups such as ECAT and the Business Roundtable include major U.S. MNCs, their political marketing efforts have necessarily stressed the benefits of liberalization for domestic firms and jobs.

To a considerable extent, the structure of interest group representation has evolved to fit the institutional political structures of commercial policymaking. In the different case of the European Community, where the institutional structure of policymaking is more complex than in the United States or Japan, lobbies are forced to divide their efforts between national capitals and Brussels. Europe-wide business groupings such as the European Roundtable of Industrialists or the Union of Industrial and Employers' Confederations of Europe (UNICE) assist the European Commission in agenda setting.[13] However, the ratification process in Europe is conducted by national governments, so lobbies must focus at this stage on national capitals. The Europea-wide industry groupings noted above tend to flexibly dissolve into domestic constituents when necessary, and to reconstitute at the European level when pressure needs to be applied on the European Commission or the European Council.[14]

In contrast to the big protrade business lobbies, traditional anti-liberalization business lobbies tended to be organized more along sectoral lines and were often made up of smaller, domestic-oriented firms and associated labor groups.[15] This made it easier for proliberalization lobbies to argue that they represented the broader national (or in Europe, the regional) interest. In cases where protectionist groups were politically powerful, such as in the agricultural, textiles, and automobile sectors in Europe and the United States, they were bought off through sectoral exclusions or new forms of protection. This was the other side of the coin of the collusive relationship between government and business in postwar trade policy. Nevertheless, on balance, the proliberalization lobbies were more influential over the broad direction of commercial policy, while the protectionist groups were more reactive. This enabled the governments of the major industrial countries to sustain gradual, if patchy, liberalization.

Because the system worked, it became entrenched. From the late 1970s, this entrenched system began to produce an important shift in the thrust of commercial policy. Proliberalization business groups increasingly argued that reciprocal liberalization needed to go beyond the traditional trade agenda of removing tariff and quantity restrictions on cross-border trade in goods. As traditional trade barriers became less important, business demands for liberalization increasingly focused on domestic regulatory barriers to market access for both exporters and MNCs. Such barriers were often especially important in service sectors, which were of growing importance for employment and output in the major countries. MNCs across the board, though first in the United States, argued that liberalizing cross-border trade was insufficient when "real" market access increasingly required the ability to establish a subsidiary in foreign markets. In addition, MNCs often felt that enforcing such agreements to lower regulatory barriers to trade and investment required enhanced dispute settlement mechanisms. This preference for "deeper integration" led to a series of regional and multilateral negotiations and some notable successes. The European Single Market Programme and NAFTA, both strongly promoted by proliberalization business lobbies, are typical examples at the regional level. The Uruguay Round of GATT, which established the WTO as its successor, is the archetypal multilateral example.

However, these successes (from the point of view of international business) have also contributed to the unraveling of the traditional system of commercial policymaking. In this system, the argument that reciprocal liberalization would create additional jobs was an essential part of the political marketing strategy of most governments to retain the allegiance of voters and unions in competitive sectors. But this argument was easier to make when the liberalization was demonstrably

about promoting the home country's competitive export sectors, where the interests of protrade business and associated union groups tended to be aligned. Such sectoral coalitions between business and labor begin to unravel with increasing foreign direct investment (FDI). Unions have feared that rising capital mobility produces strong "race to the bottom" effects on job security, wages, and labor standards. This sentiment is evident even in countries such as the United States, where rapid increases in inward compared to outward FDI flows have occurred. The NAFTA side agreement on labor standards negotiated by the Clinton administration, a response to such concerns, was more general than the usual sectoral exceptions.

Perhaps most important, if similar in nature, has been the concern of environmental groups that the postwar system of government-business collusion, and the GATT/WTO system itself, has increasingly threatened efforts to raise national and global environmental standards. Despite the environmental side agreement also attached to NAFTA, concerns have increased rather than declined since 1994. This derives from the belief that the treaty privileges economic liberalization over national environmental and social regulation of various kinds. As argued below, this was mainly due to the particularly wide legal protection granted in NAFTA's Chapter 11 and the provisions for corporate redress through a powerful dispute settlement mechanism. This was also the core of the NGO argument against the MAI.

The central point at this stage is that the "deeper integration" agenda has greatly multiplied the degree of domestic opposition to trade and investment liberalization. Having come late to this particular game, many NGOs were horrified to discover the reliance of governments on such a close relationship with big business. Unlike the old sectoral opposition to liberalization but like MNCs themselves, NGOs could respond flexibly at national, regional, and transnational levels. The MAI provided the justification to do so.

The MAI Negotiations

The contradictory pressures identified above were at their most acute in the MAI negotiations. Business lobbies, particularly those from the United States, were keen to push what they termed a "high standard, liberal investment regime" after a disappointing Uruguay Round. However, these "high standards," combined with an international dispute settlement mechanism to enforce them, were seen by NGOs as a direct threat to their goal of raising (or even maintaining) environmental and other standards in developed and developing countries. By ensuring that no MAI agreement would be possible without clauses that would protect

national autonomy on environmental and labor standards, NGOs were able to substantially reduce U.S. business support for the negotiations. Ultimately, I argue, this was one important factor in the collapse of the negotiations.

The standard business case for an international agreement on investment is that although FDI is now considerably more important than trade in international economic integration, the international regulatory architecture is wholly inappropriate to cope with this development. By 1993, annual sales by foreign affiliates of parent MNCs were estimated at $6 trillion, greater than total world trade in goods and services of $4.7 trillion (of which MNCs accounted for two-thirds).[16] MNCs in most major countries were disappointed with the Uruguay Round achievements in the area of trade-related investment measures (TRIMs) and trade in services (GATS—General Agreement on Trade in Services). Regional organizations such as the European Community and NAFTA have gone further in the coordination of direct investment rules, as had many bilateral investment treaties (BITs), mainly between developed and developing countries, since the early 1980s. The main complaint of business was that this patchwork quilt of bilateral, regional, and multilateral rules relating to investment is highly uneven, contradictory, and generally "weak" in terms of guaranteeing market access to important developing countries, particularly in much of East Asia and Latin America.[17]

Business Lobbying on Investment Rules

The most distinct and loudest voice in the demand for an international investment regime has been that of U.S. business. This is not surprising since the United States remains by far the world's most important outward-investing country and the most influential in intergovernmental forums. As the previous section suggested, it is not surprising that the U.S. government has been highly responsive to corporate concerns in this area. USTR developed a variety of bilateral, regional, plurilateral, and multilateral mechanisms aimed at encouraging the major developing host countries to adopt "liberal" investment policies. Even the State Department, which (with USTR) co-chaired the U.S. delegation on the MAI negotiations, kept in constant contact with industry groups.[18]

The pressure of the U.S. MNC lobby for a liberal international investment regime and its ability to make its preferences heard were crucial prerequisites for the initiation of the MAI negotiations in 1995. A fairly coherent set of preferences in this area was achieved through coordination between sectoral and broad U.S. business lobbies and, to some extent, influential individual firms. The Coalition of Service Industries and the Securities Industry Association was an early and vocal

supporter of an MAI, given its members' market access problems in the big Asian developing countries.[19] The U.S. electronics and automobile industries, which have increasingly globalized in recent years, were also strong supporters, since they are among the most affected by restrictions such as performance requirements.

Nevertheless, it was broad and overlapping business coalitions that were most important in the lobbying over the U.S. investment rules strategy, notably the U.S. Council for International Business (USCIB). The USCIB is the U.S. affiliate of the International Chamber of Commerce (ICC) and also represents the U.S. corporate sector in the Business and Industry Advisory Council (BIAC) at the OECD. This was one factor behind the strong U.S. preference for negotiation of the MAI within the OECD and meant that USCIB took the lead on the MAI.[20] Its Investment Policy Committee provided organizational direction and led delegations to Japan, U.S. regional centers, state governments, and governors' associations. Another broad U.S. business organization, the Organization for International Investment (OFII), represents over fifty U.S. affiliates of major foreign MNCs, mainly of European and Japanese manufacturing parents. It lobbies for national treatment for foreign-owned affiliates in the United States itself and, while very supportive of the MAI, felt unable to take a high profile on it in Washington, leaving this to USCIB.[21] This demonstrates the difficulty foreign affiliates can have in accessing policy networks in host political jurisdictions, though in this case OFII could afford to free ride on USCIB's lead.

The basic objective of USCIB was an international investment regime that would provide consistent and enforceable rules to maximize its operating flexibility in host countries. Its direct access to USTR and the support of the USCIB position from the general Advisory Committee on Trade Policy Negotiations (ACTPN) were crucial.[22] Although NAFTA and the United States' forty-odd BITs provided a high degree of investment protection for U.S. MNCs in some countries, such treaties had not proven possible in East Asia and most of South America. USCIB and ACTPN argued strongly in favor of negotiating a "high-standard regime" in the friendly OECD forum and then pressuring recalcitrant developing countries to adhere to this regime. The U.S. government accepted this position.

By high standards, U.S. MNCs mean essentially three things. First is nondiscriminatory treatment for U.S. investments, with limited and specified exceptions. This demand includes a preestablishment right as well as postestablishment treatment. Second is high-standard investor protection, including clear limits to expropriation, a right to due legal process and compensation in such an event, and, most important, the right of investors to impartial international arbitration in the event of a

dispute with a host government ("investor-state dispute settlement"). Third is full operating freedom for investors, including the right to all investment-related financial transfers, prohibitions from the imposition of performance requirements, and the right to transfer managerial personnel.

International business groups from other major OECD countries shared much of this U.S. business agenda, though the ICC, a much broader institution than BIAC, was never a strong supporter of the MAI strategy.[23] European business lobbies were less convinced that the OECD was the best forum for negotiation, with strong support for the WTO in some quarters. Japan's Keidanren business organization was also concerned that a high-standard regime that outlawed policy practices such as performance requirements would reduce the likelihood that developing countries would adhere to the MAI. As with European business, they saw the WTO as a more appropriate venue that could bring developing countries into the negotiations from the beginning.[24]

It is important to recognize that these different attitudes of business lobbies were reflected in the corresponding government positions in the preliminary negotiations that followed. The U.S. government negotiators were insistent that the "high standards" of investment liberalization outlined above were a bottom line for the United States. They stressed that these high standards were already embodied in the U.S. "Model BIT" and (arguably to a lesser extent) in NAFTA's Chapter 11, so that the United States had little interest in an agreement that would weaken the standards of protection in these existing treaties. In addition, U.S. negotiators, fresh from the difficult TRIMs and GATS negotiations, shared the U.S. business view that the narrower OECD forum was a more sympathetic and appropriate venue than WTO.[25]

In contrast, European governments, and notably Sir Leon Brittan, the European trade commissioner, were much more supportive of the WTO as a venue and of the strategy of engaging developing countries rather than presenting them with an OECD fait accompli. The Japanese government, not unusually, took a lower profile but did not publicly support the strong U.S. position.[26] The considerably "weaker" standards of virtually all European and Japanese BITs, as compared to U.S. BITs, also contributed to these countries' preference for an inclusive multilateral regime rather than the U.S. vision of a narrow, plurilateral, higher-standard regime.[27]

NGO Opposition and the Collapse of the Negotiations

As it turns out, the U.S. view prevailed. The prospects for obtaining developing country support for the launching of investment negotiations

within the WTO were bleak, weakening the European-Japanese position. The OECD Council of Ministers launched the MAI negotiations in May 1995, aiming "to establish strong rules relating to national treatment, consistent treatment of foreign investment, high standards of liberalization and investment protection (particularly the principle of right of establishment), and an effective dispute settlement mechanism."[28] Crucially, the agreement would be free-standing, and non-OECD countries could accede. In large measure this was the position set out by USCIB and USTR–State Department. Reflective of this U.S. victory was USCIB's role as chair of BIAC's MAI experts group. Negotiations began in September 1995 between twenty-nine OECD countries and the European Commission; later a few nonmember states joined.

In retrospect, the U.S. victory was a hollow one, as the negotiations bogged down over various issues. The initial deadline for agreement was May 1997, subsequently postponed until May 1998. A first draft of the agreement was produced in January 1997, but by this stage it was clear that major disagreements between the different delegations had not been bridged. Subsequent drafts followed, but these only reflected the inability of the negotiators to resolve the most controversial aspects of the agreement. Amidst growing negative media publicity and escalating NGO opposition, the negotiations were effectively abandoned in October 1998 when France withdrew from the negotiations.

The close relationship between business and governments continued in the early stages of the negotiations. The members of BIAC's MAI experts group were able to keep a close eye on the negotiations, given its direct representation at the OECD. USCIB also used its influence in the ICC to coordinate some international lobbying, and ICC's local chapters maintained close contact with government negotiators.[29] Over time, however, a number of government negotiators felt increasingly alienated by BIAC's position on the MAI and argued that it would need to make important concessions. This in turn was seen by BIAC, and U.S. business in particular, as entailing a substantive weakening of its envisaged high-standard regime. Once this happened, it was increasingly clear that OECD governments would be faced with growing domestic opposition and without strong supporters of an agreement in the ratification process. This left politicians unacceptably exposed, making the abandonment of the talks inevitable.

There is no single reason why this happened. U.S. business lobbies encountered opposition to their goals not only from environmentalists and labor groups (discussed below), but from most OECD governments as well. No government was willing to undermine its autonomy on taxation matters or the related system of bilateral taxation treaties. Thus,

contrary to business demands, taxation was carved out of the draft agreement at an early stage. The French and Canadian governments also demanded a carve-out for "cultural industries" that U.S. business lobbies found particularly unacceptable. In the U.S.-European dispute over the extraterritorial aspects of the Helms-Burton and Iran-Libya sanctions acts, U.S. business lobbies (and the administration) sympathized with European complaints but were trapped by U.S. domestic political considerations.[30]

It is possible that any one of these issues would have been sufficient to do in the MAI. On the other hand, intergovernmental compromises over difficult issues such as culture, subfederal binding, and even extraterritoriality had been possible in the past. In my judgment, the collapse of the MAI negotiations was a product of the political unacceptability of the whole package: governments everywhere found at least something wrong with the draft agreement. With business support withering, there was little that seemed right about it. Moreover, the opposition from environmental NGO groups provided a focal point for mobilization of general opposition to the MAI and was central to the collapse of business support.

In 1996, environmental groups mobilized against the MAI. U.S. and Canadian NGOs were especially vigilant due to their existing concern with similar provisions in NAFTA's Chapter 11, particularly those relating to investor-state dispute settlement. They argued that the MAI "would grant unprecedented rights to corporations, without addressing their responsibilities and obligations to the environment, workers, and communities."[31] This view of the MAI as a "charter of rights for MNCs," or "NAFTA on steroids," was encouraged by the U.S. government and business lobbies' explicit objective of using the MAI to "multilateralize" the protection available through the investment chapter of NAFTA and U.S. BITs. Environmental NGOs were most concerned with the attempt to include a broad antiexpropriation clause similar to NAFTA's and to link this to investor-state dispute settlement. They feared this would enable firms to challenge any domestic laws and standards that could be shown to have equivalent effect to outright expropriation (a so-called takings, or receipts, provision). While OECD governments, in carving out taxation, had protected this area of policy from such challenges, environmental groups felt that similar protection was unavailable for environmental standards. The legal priority such a clause could provide to investment protection could also erode existing multilateral environmental agreements.

Such concerns were underlined by the eruption in April 1996 of a dispute between the Canadian government and a U.S. firm, Ethyl Corporation. Ethyl, a monopoly producer of a gasoline additive, MMT, argued that a Canadian government ban on MMT amounted to effective

expropriation. It subsequently sued the government for compensation under NAFTA provisions, and Canada eventually (and unexpectedly) paid the company an out-of-court settlement of $13 million. NGOs argued that NAFTA, and by extension the MAI, would thereby undermine the democratic right of countries and subnational authorities to set high standards of all kinds within their jurisdiction. Organized labor, through its official representation as the other "social partner" at the OECD in the Trade Union Advisory Committee (TUAC), became concerned that the MAI could similarly undermine labor standards. The NGOs and TUAC coalesced to demand the adoption of binding and enforceable minimal environmental and labor standards by MAI signatories, the stronger of home or host country standards for investors, and the access of NGOs to dispute settlement panels.[32]

The Ethyl case increased the media attention devoted to the talks and mobilized many other groups, domestic and international, to argue that MAI represented a threat to their interests.[33] Many of these groups were domestic rather than transnational, though most drew on links with transnational groups like Friends of the Earth and the World Wildlife Fund for Nature. National groups such as the Preamble Center and Ralph Nader's Public Citizen Global Trade Watch, both in Washington D.C., and the Council for Canadians played a coordinating role and provided expertise in lobbying politicians. The Internet was effectively used as a low-cost communications medium to coordinate their activities and provide information (not least to distribute a leaked first draft of the MAI itself!).[34] Numerous state and local government authorities in Canada and the United States concluded that the MAI would undermine their own political autonomy and, in the case of the United States, the Constitution itself (in which there is no receipts clause).[35] Many cities and local authorities declared themselves "MAI-Free Zones." National politicians began to oppose the negotiations, using language lifted directly from NGO memos.[36]

U.S. business lobbies added fuel to the growing fire by vociferously opposing the inclusion of any such binding provisions in the MAI, threatening that "loading up this agreement with environmental and labor objectives" would jeopardize business support for approval of the MAI and deter non-OECD members from joining.[37] USCIB could only accept nonbinding language and "a single NAFTA 1114-type provision stating that the MAI does not prohibit countries from taking non-discriminatory environmental measures and that environmental standards should not be relaxed in order to attract investment . . . [providing they are] non-binding and not subject to dispute settlement."[38] Other business delegations, such as Japan's and Canada's, felt able to accept binding commitments on not lowering standards.[39]

This hard-line U.S. business position was both untenable and self-defeating. Most OECD government negotiators were frustrated by the BIAC-USCIB position, arguing that the inclusion of binding language on not lowering environmental and labor standards was inevitable.[40] The change of government in the U.K. in May 1997 produced convergence in Europe on this question, though strong opposition to such clauses remained in countries like Mexico, Korea, and Australia as well as the United States. By February 1998, even the State Department and USTR negotiators accepted that "there is . . . a consensus that normal regulatory action, even when it affects the value of investments, should not be considered an expropriation or 'taking' requiring compensation."[41] A month earlier, BIAC had complained that the MAI draft had fundamental shortcomings and had lost sight of the original objectives.[42] Thus, the opposition of environmental NGOs highlighted what came to be perceived by most nonbusiness observers as a central flaw at the heart of the MAI, but which the U.S. business lobby largely refused to accept. The problem for politicians, and particularly for the U.S. government, was that a more "balanced" agreement would result in business defection from the ratification process. With weakening business support, governments had little incentive to continue with the negotiations.

The erosion of the business-government coalition was a major setback for U.S. international business lobbies in particular. The OECD had proven to be a much more hostile forum than initially envisaged for the negotiation of an investment regime acceptable to U.S. MNCs. Most galling was the way in which business steadily lost control over the negotiations and its privileged status of partnership with government as the debate dragged on. As one delegate to the negotiations argued, "The main problem with the MAI is that its negotiators did not expect to have to sell it politically."[43] This expectation was consistent with the tradition of national policymaking in international commercial policy, in which a strong proliberalization coalition of business and government could count on limited domestic opposition. The following section asks whether this unexpected politicization of the MAI negotiations will prove to be a permanent development.

The High-Water Mark of Liberalization

To what extent is the outcome of the MAI negotiations symptomatic of a deeper problem in international commercial policymaking? I argue below that the new commercial policy agenda, with its emphasis on the removal of regulatory barriers to trade and investment, will continue to arouse NGO opposition to a broad range of initiatives and existing practices. This is likely to prove especially problematic for the WTO.

If the initial expectation that the MAI would not have to be sold domestically is understandable, it nevertheless reflected poor judgment on the part of its proponents. The MAI agenda was precisely focused on those areas of policy most likely to mobilize a broad range of opposition well beyond the traditional import-competing sector coalition. And the objection by U.S. business lobbies to binding labor and environmental standards clauses in the MAI made the strong opposition of labor and NGOs inevitable. The defection of labor to the "civil society" NGO ranks may be in part mere opportunism (given traditional union ambivalence on issues such as the environment), but it also reflects growing labor concern about capital mobility. The strong preference of business lobbies for a broad receipts clause in the investment protection sections of the agreement inevitably mobilized environmental opposition. The timing of the Ethyl case could be seen as unlucky from the point of view of business, but such opposition would in any case have been forthcoming.

Indeed, opposition to the MAI went considerably beyond the anti-NAFTA coalition, even bringing local activist and consumer groups to oppose the agreement. Economists have normally portrayed consumers as a group as broadly benefiting from liberalization and unlikely to mobilize against it. However, concern that the MAI would erode the rights of consumers and citizens to choose various "goods," such as local policies relating to development, positive discrimination, or human rights, was a major factor in the proliferation of anti-MAI zones in North America.

If the MAI was an extreme version of the new commercial policy agenda, it was nevertheless representative of a broader trend. As argued above, the political preconditions for the coherence of the pro-liberalization business-government coalition had been eroding for some time before the MAI. The growing difficulties of U.S. commercial policy have been especially clear in the era of the Clinton administration. First, NAFTA was judged to be unratifiable without buying off labor and environmental opposition through new side agreements, but, since then, these agreements have not stemmed such opposition. Second, although both NAFTA and WTO were sold in 1993 as broader, more balanced agreements than the MAI, they have been seen by NGOs and many citizens' groups as marking a trend toward strong dispute settlement mechanisms that are biased in favor of commercial considerations. The WTO Government Procurement Agreement, for example, is in many quarters seen as an attack on the principle of federal constitutionalism, as highlighted in the debate over the proliferation of local and state selective purchasing laws in the United States.[44] The inability of the Clinton administration to convince Congress to renew its fast-track negotiating authority since the ratification of the

NAFTA and Uruguay Round agreements is indicative of the growing strength of opposition to the new commercial policy agenda in general, not just to the MAI.

Was the fate of the Seattle meeting of the WTO in November 1999 reflective of these growing difficulties? One prominent interpretation is that the failure of the Seattle meeting was due more to poor preparation by major governments and the lack of a strong and unified business interest in a new round than to the power of NGO opposition.[45] There is surely some truth in this. However, some of these differences reflected a lack of agreement among business and major governments as to how to deal with the problems on which NGO opposition has focused. Notably, there was little agreement on whether and how to include negotiations over investment rules in the forthcoming WTO round. The U.S. government and business lobbies were reluctant to undertake such negotiations, in part because of the fate of the MAI, in part because of their long-standing concerns about negotiating over investment within WTO. However, European and Japanese business lobbies favored the inclusion of investment on the negotiating agenda, hoping that negotiations that included developing countries would prove less controversial.[46]

Nevertheless, EU pressure on the investment rules issue only increased NGO concerns that the MAI was being resurrected in a new forum. The time was long past when even WTO negotiations on investment liberalization would be uncontroversial, either for NGOs or for developing countries. The U.K./EU view was that developing countries at the Seattle meeting were less opposed to investment negotiations per se than aggrieved at their general exclusion from the agenda-setting process.[47] Even if this judgment is accurate, the attempt to include such negotiations on the agenda enabled NGOs and developing countries to make common cause at Seattle. Moreover, even if developing countries did agree to such negotiations in the future, this would not appease NGO opposition. Flush with victory over the MAI, NGOs were able to utilize many of the network linkages developed in the anti-MAI campaign to mobilize against the WTO.

Even after the Seattle negotiations, European business lobbies believe investment negotiations at the WTO are inevitable at some point in the future. They also believe that developing countries will be amenable to some form of investor-state dispute settlement, perhaps through a cross-reference to the World Bank's International Centre for Settlement of Investment Disputes (ICSID), as is done in most BITs.[48] This view may not be shared by all EU governments and the European Commission, who pushed for WTO investment negotiations on the basis that they would avoid some of the MAI's more controversial aspects,

notably investor-state dispute settlement.[49] But business pressure suggests that the issue is unlikely to go away.

At present, then, the debate within the major countries about investment rules remains one of tactics rather than of long-term strategy. Pressure from international business lobbies for future investment rules negotiations remains strong, despite the frequent claim that such rules are unnecessary in a world in which mobile firms can dictate the terms of their entry. Certainly, MNCs prefer the status quo to an investment regime that would from their perspective weaken existing standards of protection. But those who argue that these issues will return to the WTO agenda are right: the envisaged future review of the GATS and TRIMs agreements alone will directly confront the issue of investment.

Conclusion

Fundamentally, the recent difficulties of MAI and the WTO are symptomatic of a deeper unraveling of the postwar political economy of liberalization. This is perhaps most evident in the United States but is more widespread than this. In retrospect, what is surprising is how long this mechanism took to unravel, given its susceptibility to disruption. This vulnerability lay partly in the difficulty governments faced when portraying the mechanism as legitimate once it had become politicized. It also lay in the tension in the argument for liberalization that underpinned it. If domestic liberalization was sold only as a necessary concession to gain foreign opening, it was open to opponents to brand the whole process as beneficial only to global firms and detrimental to environmental, labor, and other standards—and possibly even to democratic governance itself. This does not mean that all forms of international commercial liberalization have been jeopardized by the emergence of a diverse anti–free trade coalition. Traditional trade liberalization negotiations are less threatened, at least in areas without direct environmental implications (which may be few). Sectoral negotiations may also be less threatening to NGOs (as with the WTO agreements in telecommunications and financial services in 1997). But extensive use of such a mechanism would surely also raise the same kinds of objections as did the MAI. NGOs have signaled they will organize against attempts to include investment rules in regional agreements, such as the envisaged Free Trade Area of the Americas.

Returning to the questions posed at the beginning of this article, recent developments suggest that NGOs are indeed capable of undermining traditional approaches to international commercial liberalization.

Does this imply that they need to be integrated into the policymaking process? And would this undermine the very basis of international economic liberalization?

The tenuous commitment of developed country governments to trade and investment liberalization has left many international economic institutions, including the WTO, the IMF, and OECD, in an increasingly difficult position. Officials in these organizations, often intellectually committed to liberalization and without real political constituencies, have sometimes relied on proliberalization business groups to bolster their political position. This has made them suspect in the eyes of NGOs, making it increasingly difficult for them to maintain the low political profile to which they had become accustomed. The WTO, like all intergovernmental institutions, is a child of the interests of its major country members. The appearance of secrecy, collusion with big business, and prioritization of commercial rules that critics charge it with are, ultimately, a product of the domestic political economy of commercial policy in the largest countries.

This implies that to focus mainly on the reform and "democratization" of the WTO would be to concentrate on symptoms rather than causes. Certainly the WTO is right to make efforts to achieve greater transparency and to facilitate dialogue with NGOs, including through its proposed Public Participation Forum.[50] Indeed, the WTO was until 1999 considerably further behind in this respect than most other international institutions, with the possible exception of the IMF. In recent years, the World Bank and various UN agencies have made considerable efforts to integrate NGOs in their policy processes. NGO participation was enabled at the WTO Singapore ministerial meeting of 1996 (which 159 NGOs attended) and has continued at future ministerials and in periodic seminars and briefings on various issues. Unfortunately for the WTO, such initiatives have so far not defused NGO concerns.

This article has suggested that the reason for this lies in the perceived collusive relationship between governments and big business *within* the major countries. It is this arena where most change may be needed. National polities also offer the best available means of deciding which groups have a legitimate input into the agenda-setting process. The WTO is poorly placed to make such judgments.

There are moves in this direction at the national (and EU) levels, but at present these have been mainly confined to dialogue in the form of briefings. In the United States, a common practice of the industry advisory committees has been to give notice of their meetings and to allow some time for an open session during which members of the public may attend (but not speak). The USTR's standard justification for this closed (and presumably most important) part of such meetings is

that they necessarily discuss matters the disclosure of which would seriously compromise the development by the U.S. government of trade policy, priorities, negotiating objectives, or bargaining positions. Few would argue that full disclosure of committee deliberations would be sensible before international negotiations, though as Stephen Kobrin has noted, in an information age maintaining the secrecy of such negotiations is becoming increasingly difficult.[51] But this kind of dialogue may give the impression only of window dressing rather than of real reform.

Unsurprisingly, there is much resistance from business groups (and even sometimes unions) for any dilution of their privileged position in the policymaking process. Many argue that NGO influence is disastrous for coherent global governance and that these groups are often uninformed, self-selected, and nontransparent.[52] Such views are unlikely to win the day in the longer term. In July 1999, environmental groups sued the USTR and the Department of Commerce for representation on ISACs 10 and 12 (lumber and wood products, and paper and paper products, respectively). The court required the USTR and Commerce to appoint an environmental representative to each of these advisory committees.[53] Although this is a step in the direction of integrating NGOs into the commercial policy process, that a resort to the courts was necessary to gain representation does little to dispel the concern of nonbusiness groups that the policy establishment's goal is systematically to exclude them.

The only sensible way forward is probably to broaden the representation on such committees. The United States is considerably better off than Europe or Japan in having a formal structure of representation for commercial policymaking that could, without great difficulty, be modified. The European and Japanese systems of government-business coordination are much less transparent and should be given a much firmer, legal basis. Only then will the setting of commercial policy be seen to be more representative and will international commercial agreements become easier to ratify. It would also have the advantage of necessitating a public debate about who should be represented in such deliberations and require greater transparency and accountability from NGOs and business representatives alike.

Such reforms would prevent liberalization of the form envisaged by business lobbies in the MAI, but liberalization that does not take into account other social values and interests has become both politically illegitimate and increasingly unachievable. This suggests that reform is also in the interests of business itself. Indeed, some prominent MNCs, particularly in the energy sector, have recognized this and taken steps to work with NGOs in the environmental and human rights

areas. Over the longer term, as global investment flows will continue to grow even without an international investment regime, NGOs may come to feel they have an interest in the balanced WTO investment agreement that such reform might facilitate. 🌐

Notes

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1. See Ernest Preeg, *Traders and Diplomats* (Washington, D.C.: Brookings Institution, 1970); Gilbert R. Winham, *International Trade and the Tokyo Round Negotiation* (Princeton: Princeton University Press, 1986).

2. GATT was far from uncontroversial in developing countries but, in these years, negotiations were dominated by the United States and Western Europe.

3. I use the term *commercial* diplomacy in a general sense to include traditional "trade" negotiations as well as negotiations concerning investment and other mutual market access–related areas.

4. Multinational corporations and transnational business lobbies are in a general sense NGOs as much as Oxfam or Greenpeace. However, for simplicity I adopt the popular convention of using NGO to refer only to nonbusiness advocacy groups.

5. See, for example, the dozens of messages to this effect circulated in the months before and after the Seattle meeting on the MAI-NOT website archive: http://lists.essential.org/mailman/listinfo/mai-not (27 March 2000).

6. Robert O. Keohane and Joseph S. Nye, eds., *Transnational Relations and World Politics* (Cambridge: Harvard University Press, 1971); Robert O. Keohane and Joseph S. Nye, *Power and Interdependence: World Politics in Transition* (Boston: Little, Brown, 1977); Richard J. Barnet and Ronald E. Müller, *Global Reach: The Power of the Multinational Corporations* (New York: Simon & Schuster, 1974); Robert Mansbach, Yale Ferguson, and Donald Lampert, *The Web of World Politics: Non-State Actors in the Global System* (Englewood Cliffs, N.J.: Prentice Hall, 1976).

7. For example, Kenichi Ohmae, *The End of the Nation State* (New York: Free Press, 1995). For an overview of the debate, see David Held, Anthony McGrew, David Goldblatt, and Jonathan Perraton, *Global Transformations* (Cambridge, England: Polity, 1999); and T. Risse-Kappan, ed., *Bringing Transnational Relations Back In* (Cambridge: Cambridge University Press, 1995).

8. David M. Andrews, "Capital Mobility and State Autonomy: Toward a Structural Theory of International Monetary Relations," *International Studies Quarterly* 38 (1994): 193–218; Philip G. Cerny, "Globalization and the Changing Logic of Collective Action," *International Organization* 49, no. 4 (autumn 1995): 595–625; Susan George, "State Sovereignty Under Threat," *Le Monde Diplomatique* (July 1999), online at http://www.monde-diplomatique.fr/en/1999/07 (27 March 2000); David Korten, *When Corporations Rule the World* (San Francisco: Berrett-Koehler, 1995).

9. Bernard Hoekman and Michel Kosteki, *The Political Economy of the World Trading System* (Oxford: Oxford University Press, 1995), pp. 66–68; Paul Krugman, "What Should Trade Negotiators Negotiate About?" review essay, 1997, online at http://web.mit.edu/krugman/www/.

10. Possible partial exceptions to this generalization were the small "corporatist" social democracies of Scandinavia and Central Europe, where the involvement of labor in economic policymaking became more entrenched than elsewhere. See Peter J. Katzenstein, *Small States in World Markets* (Ithaca, N.Y.: Cornell University Press, 1985).

11. Department of Commerce, International Trade Administration, "Industry Sector and Functional Advisory Committees for Trade Policy Matters: Request for Nominations," *Federal Register* 64, no. 42 (4 March 1999): 10448–10449, fr04mr99-40.

12. I. M. Destler, *American Trade Politics,* 2d ed. (Washington, D.C., and New York: Institute for International Economics and Twentieth Century Fund, 1992), p. 192; Helen V. Milner, *Interests, Institutions, and Information: Domestic Politics and International Relations* (Princeton: Princeton University Press, 1997), pp. 206–214.

13. For a useful catalogue of corporate lobbies in Europe, see the Corporate European Observatory, online at http://www.xs4all.nl/~ceo/ (27 March 2000).

14. A sectoral example is British Invisibles, which has pushed for financial services liberalization in the United Kingdom, and transnationally through its membership of the transatlantic Financial Leaders Group, which was influential in the WTO Financial Services Agreement of 1997.

15. Helen V. Milner, *Interests, Institutions, and Information,* p. 206.

16. UN, *World Investment Report, 1996: Investment, Trade and International Policy Arrangements* (New York and Geneva: UN, 1996), pp. 4–5.

17. Andrew Walter, "Globalization and Policy Convergence: The Case of Direct Investment Rules," in R. Higgott and A. Beiler, eds., *Non-State Actors in the Global Economy* (London: Routledge, 1999).

18. U.S. State Department interview, Washington, D.C., 18 June 1996.

19. This (and much of the following) is derived from interviews with industry organizations and officials in Washington, D.C., June–July 1996.

20. USCIB interview, Washington, D.C., 6 June 1996. See also Edwin D. Williamson, vice-chairman of the Committee on Multinational Enterprises and International Investment of the U.S. Council for International Business, testimony before the House Committee on International Relations, Subcommittee on International Economic Policy and Trade, 5 March 1998.

21. Todd Malan, OFII, interviewed by the author, Washington, D.C., 24 June 1996.

22. USTR, *ACTPN Discussion Draft on Investment,* September 1996, mimeo.

23. Jan Huner, Dutch representative at the OECD, speech to Chatham House Conference on Trade, Investment and the Environment, London, 29 October 1998, published on Public Citizen's MAI-NOT listserve on 3 November 1998.

24. U.S. State Department interview, Washington, D.C., 18 June 1996, U.K. Confederation of British Industry interview, December 1999.

25. Senior investment negotiator, USTR, interviewed by the author, Washington, D.C., 25 July 1996.

26. Interview, USTR, Washington, D.C., 25 July 1996.

27. See UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (New York: United Nations, 1998).

28. OECD communiqué, meeting of the Council at Ministerial Level, Paris, 21–22 May 1996, p. 1.

29. Tony Sims, U.K. MAI delegation, Department of Trade and Industry (U.K.), remarks at a conference on the MAI, British Institute of International and Comparative Law, 22 November 1997.

30. See David Henderson, *The MAI Affair: A Story and Its Lessons,* Pelham Paper No. 5 (Melbourne: Melbourne Business School, 1999); Stephen J. Kobrin, "The MAI and the Clash of Globalizations," *Foreign Policy* 112 (fall 1998): 97–109.

31. Andrea Durbin, "Transnational Bill of Rights: Negotiations for a Multilateral Agreement on Investment," *Tools for Change Newsletter* 1, no. 2 (summer 1997): 1.

32. Friends of the Earth, letter to USTR ambassador Charlene Barshevsky on the MAI, 13 February 1997.

33. R. C. Longworth, "Activists on Internet Reshaping Rules for Global Economy," *Chicago Tribune,* 5 July 1999, p. 9.

34. "Network Guerillas," *Financial Times,* 30 March 1998, p. 20.

35. See the report of the Western Governors' Association, "Multilateral Agreement on Investment: Potential Effects on State and Local Government" (1997), online at http://www.westgov.org/wga/policy/97010.htm (27 March 2000).

36. See, for example, the debates on the MAI in the U.K. House of Commons, *Hansard,* 23 July 1997, c. 865–885, and the U.S. House of Representatives, *Congressional Record,* 25 September 1997, H.7873–7879. See also the very critical Report on the MAI presented to the European Parliament (the Lalumière report), September 1998.

37. Abraham Katz, president of USCIB, letter to Ambassador Jeffrey Lang, deputy of USTR, 11 July 1997. See also Williamson, note 20.

38. Katz, ibid.

39. Letter from Kozo Uchida, director general of Keidanren, to Abraham Katz, 29 July 1997, and letter from Tom Drucker, chairman of the Committee on Multinational Enterprise and Investment, Canadian Council for International Business, to William Dymond (Canadian Department of Foreign Affairs), 5 December 1996.

40. OECD negotiator, interviewed by the author, London, 22 November 1997.

41. Under-Secretary of State Stuart Eizenstadt and Deputy U.S. Trade Representative Jeffrey Lang, Statement on the MAI, 17 February 1998, mimeo.

42. John Maggs, "OECD Advisory Panel Slams Proposed Investment Treaty," *Journal of Commerce,* 16 January 1998, p. 1.

43. Jan Huner, speech, 1998.

44. "States' Rights," *The Economist,* 25 March 2000, p. 62.

45. Interviews, U.K. business lobbies and U.K. Department of Trade and Industry, December 1999.

46. Ibid.

47. Interviews, U.K. Department of Trade and Industry, December 1999.

48. Interviews, U.K. business lobbies, December 1999.

49. Discussion with senior EU negotiator, 23 September 1999, London.

50. See the various new initiatives posted on the WTO website, "WTO and NGOs," online at http://www.wto.org/wto/ngo/intro.htm. The democratization of the WTO receives most attention in the articles by P. J. Simmons, "Learning to Live with NGOs," *Foreign Policy* 112 (fall 1998): 82–96, and Kobrin, "The MAI and the Clash of Globalizations." Simmons notes (p. 94) that greater openness to NGOs would also be consistent with the intentions of the framers of the charter of the International Trade Organization of the late 1940s.

51. Kobrin, "The MAI and the Clash of Globalizations," p. 106.

52. "Uncivil Society," *Financial Times,* 1 September 1999, p. 18; Henderson, *The MAI Affair: A Story and Its Lessons.*

53. Department of Commerce, International Trade Administration, "Industry Sector Advisory Committees (ISACs) 10 and 12 for Trade Policy Matters: Request for Nominations," *Federal Register* 62, no. 250 (30 December 1999): 73518–73519, fr30de99-54.