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Communiqué

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Correct MAI imbalances in future investment negotiations, says C.D. Howe Institute study

The problems that led to the effective suspension in April of negotiations on a Multilateral Agreement on Investment (MAI) should be fixed in future talks by making the liberalization package more balanced and the dispute settlement provisions less rigid than in the current MAI draft, suggests a C.D. Howe Institute Commentary released today.

The study, *Chilling Out: The MAI Is on Ice but Global Investment Remains Hot*, was written by Daniel Schwanen, a Senior Policy Analyst at the Institute. Schwanen explains that, MAI or not, global investment has become an important link among domestic economies, raising issues that will inevitably have to be confronted in renewed talks on an MAI or in future multilateral, regional, or sectoral negotiations.

Schwanen says many of the draft MAI's provisions on the nondiscriminatory and transparent treatment of foreign investors, and technical measures, such as easing the temporary movement of people across borders, would have helped make international investments more efficient — that is, they would have generated higher incomes for the economies of signatory countries. At the same time, he notes, the existence of such rules would have limited the ability of Canada's larger competitors to negotiate preferential treatment for themselves and provided a more predictable regime for Canadian businesses wishing to expand abroad.

But, says Schwanen, the draft MAI also seemed incomplete and unbalanced. Many countries sought numerous exemptions and reservations from the agreement, which made even many of its supporters doubt the extent of its improvement over existing national investment regimes. Furthermore, investment-related issues that are important to Canada (and other countries), such as the use of public subsidies to attract investment from other jurisdictions and the extraterritorial application of domestic laws, were given marginal profiles in the talks.

Schwanen argues that the draft MAI also paid inadequate attention to concerns that freer investment would lead to a "race to the bottom" in terms of labor, environmental, and other standards — concerns that many of the agreement's opponents used to fan fears about it and about global investment in general. An even more important and valid question mark, Schwanen argues, was the unclear effects on national property rights regimes of proposed strengthened protection for foreign investors' property rights.

These issues inevitably will resurface in future talks, says Schwanen, which should reaffirm the value of fair and open treatment for investors and of easing technical barriers to foreign investments *per se* — while leaving intact the ability of governments to apply laws, regulations, standards, taxes, and so on equally to all firms operating in the country. Rebalancing the existing MAI package and increasing the flexibility of the dispute settlement process would improve the acceptability and probably the substance of the agreement, he says.

Specifically, Schwanen proposes that concerns about the interaction between new investment rules and the ability of governments to maintain or improve labor or environmental standards be addressed head on, as they were in the "side agreements" to the North American Free Trade Agreement. Also, greater effort should be made to devise rules among governments that limit their ability to offer incentives to potential investors at taxpayers' (and other countries') expense.

Furthermore, Schwanen argues, the settlement of investor-state disputes about expropriation and compensation — in principle, a progressive concept — should be made less controversial. This could be achieved by, for example, making recourse to arbitration formally dependent on the consent of both parties involved in any specific case; requiring that panels and tribunals render their decisions as if they were interpreting domestic laws; and making the process itself nonbinding.

This study is the first in a special C.D. Howe Institute Commentary series called "The Globalization Papers," which will explore the economic and institutional implications of the deeper integration of the world's economies.

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C.D. Howe Institute
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Communiqué

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Il faudra corriger les déséquilibres de l'AMI lors des négociations à venir, soutient une étude de l'Institut C.D. Howe

Les problèmes qui ont menés à la suspension de fait en avril des négociations envers un Accord multilatéral sur l'investissement (AMI) devraient être résolus lors de toute négociation à venir sur cette question, par l'introduction d'un ensemble de mesures plus équilibrées et d'un mécanisme de règlement des différends moins rigide que prévu dans l'ébauche actuelle de l'AMI, soutient une étude de l'Institut C.D. Howe publiée aujourd'hui.

L'auteur de l'étude, intitulée *Chilling Out: The MAI Is on Ice but Global Investment Remains Hot* (Période de rafraîchissement : l'AMI est sur glace, mais l'investissement mondial reste chaud), est Daniel Schwanen, analyste de politique principal à l'Institut. Il y explique que, AMI ou pas, l'investissement mondial est devenu un lien si important entre les économies nationales, qu'il soulève des questions auxquelles il faudra inévitablement s'adresser, que ce soit lors d'une reprise des pourparlers de l'AMI, où lors de négociations multilatérales, régionales, ou sectorielles à venir.

Plusieurs des dispositions de l'AMI ayant trait au traitement non-discriminatoire et transparent des investisseurs étrangers, et les mesures techniques qu'il contient comme celle concernant la mobilité des employés entre pays, auraient aidé à rendre l'investissement international plus efficace, c'est-à-dire générateur de revenus plus élevés pour les pays signataires, soutient M. Schwanen. Il note de plus que la mise en place de règles aurait limité la capacité des compétiteurs du Canada, mais plus important que lui, de se réserver des traitements préférentiels, et aurait assuré une meilleure prévisibilité des règles du jeu pour les investisseurs Canadiens voulant prendre de l'expansion à l'étranger.

Cependant, dit M. Schwanen, l'ébauche de l'AMI semblait aussi être incomplète et mal équilibrée. Plusieurs pays y faisaient valoir un grand nombre d'exceptions et de réserves envers l'accord, ce qui à fait douter même à ceux qui l'appuyaient qu'il apporterait une grande amélioration par rapport aux règles existantes. De plus, des questions reliées aux investissements et importantes pour le Canada (et pour d'autres pays), telles l'utilisation de subventions publiques pour attirer les investissements, et la question de l'application des lois d'un pays à l'extérieur de son territoire, n'ont reçu qu'une attention marginale dans les pourparlers.

M. Schwanen soutient aussi que l'ébauche de l'accord n'a pas pris suffisamment en compte les inquiétudes concernant une baisse concurrentielle des normes, entre autres celles de l'environnement et du travail, inquiétudes que beaucoup d'opposants à l'accord ont encouragées pour s'opposer contre l'accord et l'investissement étranger en général. Une critique encore plus importante, et plus raisonnable, dit-il, est celle voulant que le renforcement de la protection des droits de propriété des investisseurs étrangers ait un effet incertain sur les lois nationales concernant la protection de la propriété privée.

Il est inévitable que ces questions refassent surface lors de négociations à venir qui devraient, dit M. Schwanen, réaffirmer le bien-fondé d'un traitement équitable et transparent des investisseurs et d'une réduction des nombreux obstacles techniques qui s'appliquent à l'investissement étranger en soi (tout en gardant intacte la capacité des gouvernements d'appliquer diverses lois, règlements, normes, impôts, etc...à toutes les firmes, étrangères ou non, faisant affaires dans leurs pays). Mais un rééquilibrage de l'ensemble de mesures présentement prévues par l'AMI, ainsi qu'un mécanisme de règlement des différends plus flexible, rendront l'accord plus acceptable et aussi probablement en amélioreront le fond.

M. Schwanen recommande plus précisément que les inquiétudes au sujet de la capacité des gouvernements de maintenir ou d'améliorer les normes environnementales et du travail, suite à l'introduction de nouvelles règles sur l'investissement international, fassent l'objet d'un langage précis au sein de l'accord, tel celui contenu dans les « accords parallèles » à l'Accord de libre-échange nord-américain, et que plus d'efforts soient faits pour en arriver à une entente pour limiter la concurrence de subventions entre gouvernements, aux frais des contribuables, pour attirer les investissements.

De plus, M. Schwanen soutient qu'il faudrait diminuer la controverse entourant le règlement des différends entre investisseurs et gouvernements pour les questions d'expropriation et d'indemnisation qui est en principe une idée très progressive. Par exemple, le recours à l'arbitrage lors de telles disputes pourrait être soumis à l'approbation des deux parties dans chaque cas précis, on pourrait exiger des groupes spéciaux de règlement des différends et des tribunaux internationaux qu'ils rendent leurs décisions comme s'ils interprétaient les lois nationales, et le processus lui-même pourrait n'être pas contraignant.

Ce Commentaire est le premier d'une série de publications occasionnelles intitulée « Les cahiers de la mondialisation », qui explorera les conséquences à la fois économiques et institutionnelles de l'interdépendance plus poussée des économies.

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Chilling Out:

The MAI Is on Ice but Global Investment Remains Hot

by

Daniel Schwanen

The difficulties of negotiating a Multilateral Agreement on Investment (MAI) have sometimes obscured the reasons why it is important for governments to agree on mutual rules for the treatment of investors. These reasons lie in the significantly increased interdependence of world economies in recent decades, which, in turn, has already lead to a proliferation of sectoral, regional and bilateral investment rules over the past 15 years.

The MAI is an attempt to expand, strengthen, and provide a unifying force for these existing rules. Successful negotiations to that effect would directly benefit Canada by making the country more attractive to worthwhile investments and by affording fairer treatment for its investors abroad.

The MAI contains many worthwhile market-opening measures but, as currently drafted, it lacks balance. In particular, while investments *per se* should be subject to even greater liberalization than is now contemplated, investment-related issues — such as competition for subsidies between jurisdictions, fears that an agreement would imperil high environmental, labor, or other standards, and issues of competing jurisdiction or extraterritoriality — should be addressed in a more comprehensive manner, whether in continued MAI talks or in other forums in which investment issues inevitably will resurface.

Furthermore, the current MAI draft fails to address concerns that the investor-state dispute settlement process regarding compensation for expropriation may have poorly understood consequences for domestic laws and policies. Although the compensation principle is sound in itself and the draft MAI's idea of impartial investor-state dispute settlement is actually quite progressive, the process could be made nonbinding, something that has not prevented the dispute settlement system under the General Agreement on Tariffs and Trade from operating fairly successfully through most of the postwar period.

Main Findings of the Commentary

- The negotiations toward a Multilateral Agreement on Investment (MAI) among countries belonging to the Organisation for Economic Co-operation and Development (OECD) have officially entered a “pause” that some observers say could be permanent.
- Yet the fast-increasing interdependence of the world’s economies through investment and trade is continuing apace, which makes it important for countries to agree on mutual rules for the treatment of investors. This is why, despite the difficulties encountered in the MAI talks, investment issues are increasingly at the forefront of sectoral and regional treaties, and why bilateral investment treaties have proliferated in recent years. Indeed, most aspects of the MAI as it currently stands were inspired by existing codes and agreements.
- By strengthening these commitments and extending them to more forms of investment, an MAI would offer Canada assurance that larger competitors could not negotiate rules preferential to them, and the country would likely see a diversification in its global investment relationships. Moreover, Canadian businesses wishing to expand abroad would face a simpler, more predictable international investment regime.
- The MAI negotiations themselves suffered from a number of problems. While coverage was intended to be comprehensive in principle, OECD governments could not agree on some key definitions, concepts, and sectoral exclusions and reservations three years into the negotiations. Key investment-related issues — such as subsidies, extraterritorial application of domestic laws, and the link between strong global investment rules and the maintenance of high domestic standards and regulations — seemed incompletely addressed.
- The planned MAI was also too ambitious in applying the (valid) principle of compensation for expropriation, given that the consequences of binding international adjudication of foreign investors’ property rights may be poorly understood and that individual countries may reasonably disagree on the appropriate degree of protection for certain classes of investments, such as intellectual property.
- Whether in revived MAI talks or in other forums, the solution to the current impasse seems to lie in reaffirming and strengthening the MAI’s positive liberalization measures and in addressing more directly the outstanding issues of balance — such as concerns about a possible “race to the bottom” in environmental or labor standards or competition among governments to offer the most attractive incentives to potential investors.
- At the same time, ways can be found to make investor-state dispute settlement regarding compensation for expropriation — while actually a progressive way of dealing with conflicts between governments and investors, as opposed to having the investor’s home government intervene in a dispute — less controversial. These include making recourse to arbitration in specific cases formally dependent on the consent of both parties involved; introducing a requirement that panels and tribunals render their decisions as if they were interpreting domestic laws; and making the process itself nonbinding, as is the process that has fairly successfully guided the General Agreement on Tariffs and Trade throughout most of its half-century of existence.

This spring trade ministers representing the member nations of the Organisation for Economic Co-operation and Development (OECD) decided, in effect, to suspend negotiations on their proposed Multilateral Agreement on Investment (MAI), an accord dealing with common rules on the treatment of foreign investors and their investments.

These negotiations had begun in May 1995 and were initially supposed to be concluded in April 1997. But it was apparent weeks before the extended deadline of April 1998 that it, too, would be missed because of disagreement among governments on the precise contents of the accord and because of organized public opposition to it. As a result, a number of commentators[1] are predicting that the agreement will die of neglect, even if it is not officially abandoned.

What would such a failure mean for Canada? What are the issues that a multilateral accord on investment seeks to address? How does the MAI as currently drafted handle them? What can one conclude about the possible contents of an agreement from the setback in its negotiations? And what should the world community do now? Should the MAI be revived, or can progress be accomplished in different ways? These are the questions I examine in this *Commentary*.

The main conclusions of the study are that a multilateral accord on investment would allow Canada to benefit even more than it does now from the current trend toward greater interdependence of the world's economies through crossborder trade and investment. Nevertheless, achieving this aim through the MAI as currently crafted poses serious difficulties. On the one hand, its coverage is incomplete, in terms of both the actual sectors liberalized and the lack of consideration of a full range of investment-related issues, such as public subsidies. On the other hand, it gives rise to serious questions about the impact of the agreement on existing domestic laws, standards, and practices, especially with respect to the meaning of expropriation of private property and proper compensation for it.

Therefore, in any revived negotiations on investment issues, although governments should stand fast on — and indeed expand — the many solid market-opening measures and principles envisaged in the MAI (many of which are already firmly rooted in a variety of bilateral, regional, and global agreements), they should also re-evaluate those elements that cause concerns about supranational intrusion in domestic affairs and about a possible "race to the bottom" in national standards, and they should consider introducing new arrangements that would balance out those concerns.

Why International Investment Needs Rules

Foreign direct investment (FDI) is defined as investment in a foreign country involving the establishment of operations or the acquisition of a controlling interest in an existing enterprise there. It includes, as well, the "parent company's" (foreign investor's) reinvestment of earnings in and loans to such "affiliates." The flow of FDI is enormous — and growing. In 1996, it amounted to almost US$350 billion worldwide, more than half of it going from one OECD country to another.

To put this number in perspective, consider that it represents about 5 percent of the total investment in fixed capital (machinery, equipment, and structures) installed in the world that year. The equivalent figure for 1979 and 1980 averaged 2 percent. And because international investment is growing faster than domestic investment, the value of the outstanding stock of FDI reached the equivalent of just over 10 percent of world gross domestic product (GDP) in 1996, more than double its 1980 share.[2]

Furthermore, in the 1980s and 1990s, international portfolio investments — those in financial instruments, such as equities and bonds, not resulting in a controlling position — have exceeded the value of world FDI.[3]

This increasing importance of foreign investment in most national economies, combined with the fact that international trade in merchandise and services has grown approximately twice as fast as overall economic activity since the early 1980s, means that the world's economies have become more interdependent than ever before, part of a phenomenon often referred to as *globalization*. In turn, the main private economic units linking the various world economies together through trade and investment flows are, by definition, *multinational enterprises* (MNEs).

These facts are generally known. Less well understood is that, although MNEs act as the conveyor belts of globalization in their respective sectors, they are far from taking over ownership of domestic economic activity. In fact, 94 percent of the world's GDP is still produced by domestically owned entities. What the global statistics indicate is that more and more of this domestic activity is linked to the outside world via the activities of MNEs (as well as by exporting and importing done directly by domestic firms).

Thus, although direct employment by MNEs may not have increased much in the 1980s and 1990s (in their home or their host countries),[4] one cannot conclude that these firms do not contribute to overall employment growth in the economy. Through their purchases from local suppliers, they sustain opportunities for domestic firms (and, hence, their workers) to partake in global economic growth. And through being positioned to seek the cheapest available inputs and technology, they generate lower prices for consumers that are converted into additional purchases or savings, which then stimulate investment expenditures, such as housing.[5]

The increased presence of MNEs within most countries' economic structures might be a matter of concern if only a few players controlled global trade and investment flows. But MNEs are numerous and anything but a monolithic bloc. The United Nations counted 44,500 MNEs in the world in 1996, with an aggregate of over 275,000 foreign affiliates.[6] Many of these firms are widely owned (for example, by institutional investors such as pension funds and mutual funds), and most compete ferociously among themselves.

As a result, most economic experts and governments see FDI as a positive force in world economic development — although, as made clear by the recent Asian economic crisis, foreign investment is not a substitute for sound domestic policies.

Investment Issues

The growing interdependence of world economies inevitably raises matters that countries must settle among themselves unless they wish to return to the damaging isolationism of the 1930s or to the unfettered capitalism of even earlier years. Among these matters are issues pertaining specifically to the regime for cross-border investments. The MAI is an attempt to deal with these between OECD countries.

Given that direct investment is almost always a long-term commitment, it is encouraged by transparent rules governing the conduct of businesses, by nondiscriminatory treatment of investors, and by effective assurances against arbitrary confiscation. Thus, in signatory countries, multinational agreements can stimulate FDI that is efficient — that occurs where it has the potential to generate the highest income, rather than being channeled by barriers.

In addition, just as reciprocal reductions in tariffs and in administrative and other nontariff barriers have spurred trade in goods and services, reciprocal easing of barriers to activities that complement FDI can help countries benefit more from it without compromising a government's ability to attain any policy objective it desires (provided that objective is not to create obstacles to foreign investment *per se*). For example, the crossborder movement of specialized and managerial workers — a clear complement to many kinds of FDI — is likely to require reciprocal changes in each country's immigration regulations, yet none need modify its policies as to who may or may not become a permanent citizen.

An investment agreement that succeeded in setting clear rules, in preventing discrimination between domestic and foreign investors, and in removing various technical obstacles to FDI would be an important step toward higher incomes in signatory countries. Take, for example, the fact that competitive and efficient services (such as transportation, finance, telecommunications, and software design) are key to sustaining any high-wage manufacturing activity. Since bringing services to a market almost always requires a corporate presence there, clear investment rules would facilitate both the expansion of services sector employment and the maintenance of high-paying manufacturing jobs.

Related Issues

The increasing reliance on FDI raises other important issues, which may or may not be specifically addressed in an investment-liberalizing treaty but should certainly be considered conceptually in conjunction with it.

For example, FDI makes conditions ripe for what are sometimes called *differences over conflicting jurisdictions* — that is, the possibility of extraterritorial application of domestic laws. Although it is widely understood that corporate entities should follow the law of the country in which they are operating, the exceptions to that generality remain very much under debate. Under what circumstances is it appropriate for a firm to be punished because an affiliate (or its parent company), by following the laws of one country, takes a course of action that another sees as detrimental to its security interests, to its receiving its fair share of corporate taxation, or even to the domestic or global environment (to mention examples of current relevance)? Without rules, the views and interests of the more powerful party will tend to prevail in such conflicts.

Increased reliance on FDI raises two more issues — and possibilities — for an accord. First, to the extent that governments fear feeling forced to compete for investment by offering subsidies or other incentives, or by lower-ing otherwise sound environmental or labor standards, they may wish to establish codes spelling out the limits of such behavior. Second, in circumstances in which the greater flow of FDI could make the application of domestic laws, such as antitrust laws, administratively more difficult, governments may consider pooling their sovereignty — for example, through exchanging information and even reaching common decisions on the impact of large cross-border mergers and acquisitions.

Current Foreign Investment Rules

The issues described above are not new, and the MAI is far from being a unique attempt at devising rules governing crossborder investments. Many such transnational agreements have existed for decades. For example, several OECD codes already cover investment relations between countries and between MNEs and governments.

Two such agreements, considered binding by OECD countries — although individual countries have, of course, made numerous reservations for specific sectors and policies — are key:

- the 1961 Code of Liberalisation of Capital Movements, which covers, for example,

the right to transfer funds in or out of a country to acquire or dispose of investments; and
- the Code of Liberalisation of Current Invisible Operations, where *invisible* refers to operations not involving merchandise trade but typically investment related, such as the purchase of accounting services, loan and dividend payments, and employee remuneration.

In addition, the 1976 Declaration on International Investment and Multinational Enterprises calls for assurances of national treatment — nondiscrimination between domestic and foreign investors. It also contains an Instrument on Investment Incentives and Disincentives, which is aimed at greater transparency in subsidy practices, and voluntary Guidelines for Multinational Enterprises, representing "the collective expectation of OECD governments" as to the behavior of MNEs in such areas as employment relations and environmental protection.

Bilateral Treaties

Meanwhile, bilateral investment treaties (BITs) — which, in Canada, are called *foreign investment protection agreements* (FIPAs) — have grown rapidly around the world from 124 in 1977 to more than 1,300 today.

Although these agreements exhibit significant differences, those entered into by Canada tend to follow the following model:

- They apply to a wide range of investments.
- They commit the signatories to a standard of "fair and equitable" treatment of foreign investors as understood under international law, regardless of whether domestic investors receive the same treatment.
- They contain undertakings of national treatment of one country's investors in the other country. This obligation is, however, rather weak, in that it is to be undertaken "to the extent possible" and is clearly subordinate to the host country's "laws and regulations."
- They allow expropriation of the foreign investment only when conducted "for a public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation," with the expropriation or the compensation reviewable by an independent authority.
- They contain provisions for dispute settlement: the arbitration of disputes between investors and the host state under recognized international (United Nations) rules and *ad hoc* arbitral tribunals for disputes between signatory governments concerning the interpretation or application of the agreement.[7]

In recognition of the long-term nature of the investment decision, BITs cover any investment made before or after the agreement comes into force. Even if one or both governments end the agreement (which they can generally do on a year's notice), its terms remain in force up to 15 years for investments made before termination.

Multilateral and Regional Rules

In addition to specific investment agreements, most modern multilateral trade agreements contain many provisions that directly affect the investment regime. For example, both the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA) prohibit trade-related investment measures (TRIMs), such as those compelling an investor to boost one country's exports, net foreign exchange earnings, or domestic content at the expense of another's — matters that are not covered by the typical BIT. As well, both the World Trade Organization (WTO) and the NAFTA protect various types of intellectual property, ranging from a wine's regional designation to engineering blueprints, and the NAFTA opens up the temporary movement of business, professional, and technical staff among the three signatory countries.

Economic unions, such as the European Union (EU), often provide investment-related measures, such as prohibition of incentives that attract investments to one country at another's expense, and submission of all large mergers to a common competition (antitrust) standard.

Next to the extensive measures taken by economic unions, the current NAFTA rules probably provide the strongest protection to investors and investments in effect between separate countries. One reason is that the wording of the NAFTA's national treatment obligation (and of some other obligations) is stronger than that provided in, for example, the typical BIT involving Canada. Moreover, following the typical model of BITs entered into by the United States, the NAFTA's exceptions to the obligations (such as Canada's ability to review major takeovers by foreigners, to require domestic ownership of firms in certain industries, and to exempt any investment policy in the cultural and social services sectors) are very clearly stated in the main body of the agreement or in separate schedules.[8]

Because of the strength and transparency of the investment regime under the NAFTA, that agreement was used as a guide for many aspects of the MAI as currently drafted, although the latter would apply to more types of investments.

Some Implications

Although foreign investment rules are indeed growing around the world, the existing hodgepodge of codes and treaties can be inefficient and even discriminatory toward small and medium-sized economies. One reason is that the multiplicity allows large players to negotiate their own set of preferential arrangements between themselves or with smaller countries, leaving players in less powerful countries or blocs to scramble for equal treatment. A second reason is that the sheer number of investment and investment-related provisions in various agreements often makes it difficult and hence costly for a medium-sized business wanting to expand abroad to determine what rules actually apply.

Canada has another reason to consider signing on to multilateral, rather than regional (NAFTA), investment rules. Doing so would help to further diversify its investment relationships. It would extend significant portions of a regime already mostly in place with the United States and Mexico to other countries with which Canada has or desires to have significant investment relations. In short, a more general, rules-based investment regime would, in principle, bring benefits to Canada.

The Current MAI Draft

As currently drafted, the MAI attempts to address a number of the issues raised above — although others, such as a code on incentives and issues of extraterritoriality, have had only a marginal profile in the negotiations so far. Overall, the draft applies basic sets of rules to many different types of direct and portfolio crossborder investments. Among these rules are:

1. *A general national treatment obligation*, stated as strongly as it is in the NAFTA. Governments, government-designated monopolies, and public sector enterprises would have to treat foreign firms from signatory countries no less favorably than domestic firms regarding, for example, the rules of competition, tax treatment, conditions for receiving a subsidy, the provision of goods and services, and government

procurement. Any of these rules could continue to vary greatly from country to country, but the MAI would ensure that they applied equally to foreign-owned and domestically owned firms.

2. *A most-favored-nation (MFN) obligation*. No signator's laws and regulations could favor investors from any foreign country over those from any OECD country.

3. *Undertakings about the transparency of various domestic rules and regulations*.

4. *Various provisions common to all signatory countries facilitating the operation of MNEs*. Examples include facilitation of the temporary movement of key (management or specialized) personnel, the transfer of money, and (in some cases, still to be delineated) the transfer of information related to the ordinary conduct of business or to the acquisition or sale of a business. None of these provisions would affect each country's general immigration, prudential, or information-reporting requirements. All would, however, be of great help to, for example, a Canadian-based MNE that needed to send technicians to an offshore operation to provide service or to instruct foreigners in the use of one of its products (such as sophisticated laboratory equipment).

5. *Measures regarding performance standards*. Similar to provisions already included in the NAFTA, these measures were designed to ensure that one country's rules governing FDI do not impose requirements that would force investors to engage in certain activities detrimental to other signatory countries. For example, signatory countries could not require, as a condition of allowing an investment to proceed, that any investor (OECD, non-OECD, or even domestic) reach a certain export level or conduct a certain amount of research and development (R&D) or purchasing strictly within the country. Countries would still to be able to use a range of policies, including tax breaks and subsidies, that encouraged activities such as R&D or employment creation on their territory provided the policies applied to both domestic and foreign investors.

6. *Rules about expropriation*. Such rules would protect investors from any OECD country from expropriation without compensation in another OECD country.

7. *Many exceptions of a general nature to the above rules*. One such exception is for "essential security interests," defined in a way more constrained than in the NAFTA — a difference that could be significant for Canada in terms of how often the exception could be invoked to permit US policies discriminating against Canadian investors. Another exception is the provision for safeguards that permit a country to suspend the agreement in the event of serious balance of payments or exchange rate diffi-culties. And as under other trade or investment agreements, the draft MAI does not constrain any taxation measure or measure aimed at preventing tax evasion unless it clearly constitutes expropriation (the grounds for that claim being very narrow).

8. *The right for every signatory to exclude certain policies or industrial sectors from some or all of the agreement's provisions*. These "reservations and exceptions" could be "bound" — that is, when governments claiming them agree to phase them out or to subject them to future negotiations and not to introduce new measures incompatible with the agreement — or they could be or "unbound" — in areas in which the country permanently reserves the right to intervene, including with new measures that

would otherwise violate the agreement. (Examples of "unbound" reservations are the Canadian health and social services exemptions in the NAFTA.)

9. *A dispute settlement system*. It would involve both international settlement of disputes arising between governments on the interpretation or application of the agreement and expert international arbitration of disputes between governments and foreign corporations regarding the application of the treaty and, in particular, the question of what constitutes expropriation and proper compensation for it.

Overview

Clearly, key aspects of the MAI as drafted originated in already-existing codes and treaties. Nevertheless, the MAI would represent a significant change from the present situation. For each country, specific sectors, practices, and forms of investment excluded from current rules could now fall under the MAI, unless the other signatories agreed the exclusion could continue. As well, the strength of commitment to nondiscriminatory and transparent policies would be stronger in the MAI than in many existing agreements. Furthermore, as discussed below, domestic laws and practices that currently govern the definition of expropriation and the value of compensation for it could be subject to a new international standard.

Roadblocks

Seeing that, by and large, the MAI as currently drafted goes mainly in the direction of clarifying, unifying, and strengthening existing rules, the question is: Why have countries not been able to agree on these general rules and on the reservations that they should be able to list? The reasons are several.

Various environmental, labor, and nationalist or isolationist organizations around the world have made well-publicized attacks on the agreement on grounds ranging from complaints that it is too narrow (that it does not deal with some issues these groups are concerned with) to claims that it is too wide (that it puts too onerous a discipline on the actions of governments).

Less well known is the fact that the negotiating governments themselves were divided over what the agreement should contain. Indeed, three years after the beginning of the negotiations, key terms (such as what constitutes expropriation and even what forms of investments are to be covered) had not been agreed on. That situation, if not remedied, would obviously result in the agreement's demise.

Finally, although many business leaders and intellectual free traders support the idea of an investment agreement, no one wants to end up with one that is flawed. And the flaws and potential flaws in the current MAI draft seem too glaring to ignore. This section of the *Commentary* describes some of them.

The MAI Is Incomplete

Even from the standpoint of those who favor a multilateral investment accord in principles, the MAI as currently drafted is incomplete.

One of the main problems is that many potential signatory countries are unable or unwilling to really open up new sectors to foreign investments — that is, to make the general rules apply to more sectors than those in which foreign investment is already free *de facto*. The potential economic advantages of signing such a deal are thus correspondingly less for all countries, and though many reservations from the agreement might be included under the general rules in future negotiations, the immediate liberalization to be expected is perhaps not worth the political investment of getting the MAI through the domestic ratification process.

Partly, this situation stems from a structural problem. One of the disadvantages confronting MAI negotiators is that an OECD-only agreement on such far-ranging issues does not fit very well with the expanding WTO architecture. Broadly speaking, an investment agreement would contain far more advantages for Canada and others if it encompassed developing countries (almost none of which belong to the OECD) as well as developed nations, even if including the former meant that the commitments to liberalize investment regimes were modest to begin with (as they are in the 1997 WTO agreements on financial services and telecommunications, which include most of the rapidly developing economies).

The technical problem is that many measures that would liberalize investments would also result in opening markets for business services (which often depend on the ability to be physically present). And the MFN obligation in the existing General Agreement on Trade in Services (GATS) mandates that, when countries open up their services sector to providers of one country, they must make it equally accessible to those of all other GATS signatories (over 130 countries). Thus, some OECD countries may be understandably reluctant to make new liberalizing commitments, since these would have to be extended to many non-OECD countries that themselves would not have had to make any more concessions than they have in the GATS.

The MAI also appears incomplete as an instrument aimed at dealing with global investment issues. For example, ideas of rules governing incentives or of a code of conduct for corporations have practically been discarded from the negotiations (although talks on the extraterritoriality question continue at the margins).

Commitments on not lowering labor and environmental standards in order to attract business from other countries have started appearing in the MAI negotiating text, although they are currently not as strong as those contained in the two NAFTA side agreements on these issues (see Box 1). The level of public, business, and intellectual support for the MAI is not independent from the progress (or lack thereof) that is being made on these issues.

The MAI Is Too Ambitious

Another problem with the MAI, one that has set off a number of valid objections to it, is the current draft's attempt to establish binding general rules concerning property rights and their valuation, rules whose consequences may not be clear within each country. While concepts such as national treatment and reciprocal obligations to ease investment-related barriers form a relatively easy-to-understand package, the question of compensation for expropriation may have poorly understood consequences for each country's property rights regime.

There is broad agreement that generally ensuring the protection of property rights — and specifically banning expropriation without compensation — is a good thing. But the question is whether countries, even those of the OECD, are ready to devise a regime that could, in effect, create a binding international law on the meaning of expropriation, let alone one that could serve as a model for other (mostly developing) countries to sign on to. In many instances, there is not even consensus on the appropriate standard of protection for various forms of property.

Not surprisingly, this area is the one in which the MAI draft has attracted the most serious criticism. A new international regime of property rights for foreign investors would, where applicable, clearly form an alternative to what each country now makes available to

Box 1: *Should an Investment Treaty Cover Labor and Environmental Standards?*

The view that international agreements on trade or investment should also allow dispute settlement panels to set labor and environmental standards in member countries directly contradicts the view that governments should retain full sovereignty over regulations within their own borders.

International trade or investment agreements leave governments perfectly capable of signing global agreements on environmental, labor, or human rights issues if they wish to do so. Such agreements could be enforced by the threat of trade or investment sanctions against signatory countries that did not respect their engagements, as long as the specific obligations flowing from, for example, an environmental agreement took precedence over those in the trade or investment agreements.[a] Thus, there is little point in engaging in new international labor or environmental standards-setting exercises within the context of trade or investment agreements.

Yet, inevitably, such agreements will sometimes intersect with environmental (or labor or health) regulations without one's having clear precedence over the other. For example, what happens if one country charges that another's environmental measure is not objectively necessary to achieve the stated purpose of the measure, that it is more trade restrictive than necessary to achieve that purpose, or that it is administered in a way that discriminates between products or investors on the basis of their origin, rather than their effects on the environment? In that case, it is reasonable to investigate whether the measure that appears to be a social or environmental standard is, in fact, imposed in order to create an obstacle to trade or investment.

Trade agreements such as the WTO and the NAFTA contain rules that permit such investigations. Such an investigation is not a questioning of each country's right to pursue particular health, environmental, and labor objectives through the adoption of various standards and regulations. Rather, it is a way to ensure that the measures adopted are not imposed simply to thwart trade or investments.

As well, countries may wish to limit among themselves the possibility of a race to the bottom — an unfair lowering of standards for the purpose of attracting investments. The NAFTA's approach to this issue states that it is "inappropriate" for a signatory to relax domestic health, safety, or environmental measure in order to attract investment. Through the side agreements on labor and environmental cooperation, complaints and review mechanisms exist to ensure that the countries actually enforce the standards they profess to practice.

This approach seems the best way to reconcile the quest for more open and transparent trade and investment policies with countries' rights to determine the domestic standards they deem appropriate.

a The NAFTA's Annex 104.1 was created to list environmental or conservation agreements that can supersede the free trade agreement, in the event of inconsistency between specific obligations under the two.

domestic or foreign investors. (It is hard to imagine that, over time, the same regime would not apply to domestic investors, who could claim that they were being discriminated against if its rules were not available to them.)

On this issue, Alan Larson, the US assistant secretary of state for economic and business affairs, recently told the US House of Representatives Subcommittee on International Economic Policy and Trade that the main features of the MAI would be expected to include "international law standards for expropriation and compensation, consistent with U.S. legal principles and practice."[9] But countries whose "principles and practices" differ substantially

Box 2: *Expropriation and the NAFTA Complaint of Canada's MMT Trade Ban*

The improving MAI language on what expropriation is *not* should calm the concerns of those Canadians who have extrapolated what might happen under that agreement from the current NAFTA complaint by Ethyl Corporation over Canadian federal regulations banning the import of the gasoline additive MMT. Some commentators have portrayed this case as an example of private companies' having the leeway to legally challenge governments for any action, such as a new environmental standard, that reduces profits.

In fact, the matter at hand before a NAFTA panel is not whether the federal government has the right to ban the additive altogether, but whether it has the right to ban the importation and, indeed, interprovincial movement of this product without also banning its domestic production or sale. Indeed, three provinces are also challenging the federal measure under Canada's own Agreement on Internal Trade.

The proposals of the MAI negotiations chairman on labor and environmental and related matters, contained in the April 24, 1998, negotiating text, now make clear that governments' normal exercise of their regulatory powers would

from those of the United States would not want their property rights standards implicitly harmonized with those of other countries through cases decided on by international panels — certainly not before the signatories had agreed on what the proper underlying standards are.

These concerns were fanned by the negotiating text's initially fuzzy language concerning what *expropriation* meant, which led to concerns that firms could use the MAI to challenge a government for *any* action that reduced their profits. Realizing the confusion, OECD governments agreed in February 1998 that "the MAI will not inhibit the exercise of the normal regulatory powers of government and that the exercise of such powers will not amount to expropriation."[10]

This principle will likely be incorporated into the text of the MAI if the agreement is revived at a later date, but the original confusion created many fears (see Box 2).

Other issues related to property rights that came up in the MAI negotiations have not yet been resolved. They include the extent to which foreigners can be restricted from holding shares in newly privatized firms, and whether the definition of *investments* should be expanded to include, for example, government concessions and licenses).

In light of these issues, it is probably best to backtrack a bit and realize that agreements such as the MAI can best be seen as one piece — albeit an important piece — of the puzzle of opening markets to foreign investments and trade. If and when such agreements begin to define rights attached to certain types of properties in each country (as opposed to simply insisting that existing rights be applied in a nondiscriminatory and transparent way), it is natural for the policymakers and the citizens of every country involved to seek a full understanding as to what the obligation means and of whether it is consistent with existing domestic legislation. Although I can think of few reasons why such consistency would not apply in the case of Canada (the NAFTA experiment will continue to provide a useful benchmark here), the question may be too sensitive to thrust forward as a key binding element of a multilateral agreement.

The MAI and Canada's Sovereignty

While the MAI has a long way to go before the above issues are addressed properly, once they are, in this or any other forum, the result may well be an investment agreement worth signing. But capturing the benefits of two-way FDI via such an international agreement would not be worth the price if it meant depriving the government of Canada, or indeed the provinces, of the power and flexibility needed to address domestic policy issues, a question to which I now turn.

Treating foreign investors in a fair and transparent manner, the basis of the investment rules already described, does not in and of itself reduce a country's sovereignty over the laws and regulations that apply on its territory. The principle is simply that domestic laws and regulations continue to apply within a given territory irrespective of the nationality of the investor to which they apply.

Thus, any investment agreement founded on this principle could not, in and of itself, obviate the use of various policy instruments in all participating countries, let alone level them to the lowest common denominator.

Policymaking

An MAI, like the NAFTA before it, would indeed abolish certain policies that discriminate between foreign and domestic investors. To some Canadians, this change would spell the loss of room to maneuver in policymaking, such as the ability to demand that a foreign investor conduct a certain amount of R&D or create a certain number of jobs in Canada. But Canada would not relinquish its ability, to put conditions on investment in general; it would only have to keep the range of conditions that it could put on foreign investors within what could be applied to domestic investors.

For example, Canada does not normally require domestic investors to make any commitment on jobs or R&D, but it does require that they follow various environmental, health, and consumer protection rules. The same would apply to foreign investors, under any arrangement based on the principle of national treatment.

Under an MAI, Canada's Parliament would naturally retain control over the truly important economic and social levers — including tax policy — that can help shape the country's comparative advantage. Furthermore, since investment agreement could provide for appropriate exceptions, Canada could continue to control the degree of foreign ownership or require undertakings of foreign investors in sectors where it considered doing so crucial.

Expropriation

In the signatory countries, the MAI would likely abolish expropriation without compensation for foreign investors only. Although I have reservations about the applications of this point in the MAI as things now stand, the principle of compensation for expropriation or nationalization is sound. Furthermore, it has been in effect in Canada for a long time, if not always uniformly applied in dealings between governments and the private sector. Even at the peak of the nationalistic economic policy of the late 1970s and early 1980s, government-owned Petro-Canada paid the full price for its acquisition of various assets from the private sector, while the Quebec government was forced to compensate minority shareholders of Asbestos Corp. following a challenge in the Supreme Court of Canada.

The reality is that requiring compensation for expropriation is a good idea because it forces governments to evaluate the net social benefits of their action before proceeding with it.

A Net Gain

Thus, an MAI would not reduce the range of truly useful policy instruments at the federal government's disposal. Indeed, it well might increase Canadians' control over their economic affairs in that other countries, by losing equivalent room for maneuver, would be relinquishing economic power over Canadians. One result would be a more level playing field for Canadians, an especially important consideration when this country is competing with entities such as the United States, Europe, and Japan, that have larger markets and deeper pockets with which to entice business investment onto their territory.

The reality is that these entities have much more sway with investors than the Canadian government if they can maintain or put restrictions on investments as a condition for entry into their markets. If all countries can put up obstacles to an investor (or its products or services) unless it pledges to conduct more R&D or employ more people within their borders, that investor is more likely to locate within the bigger markets, rather than in Canada.

Finally, not having an MAI could be detrimental to Canada's sovereignty. If relations between governments and MNEs are not codified, governments of countries with medium-sized economies, like Canada, are potentially subject to various pressures from the home government of a foreign investor who is dissatisfied with the host country's policies. This is less likely to happen for the range of policies and sectors covered by an agreement, such as an MAI, calling for transparent and nondiscriminatory procedures in governments' dealings with foreign firms.

Unbundling and Rebalancing the Package

One key to making progress on investment issues generally and on an investment agreement specifically is to stand fast on the many solid market-opening measures and principles that are envisaged in the MAI, as currently drafted, and that are already firmly rooted in a number of OECD or bilateral agreements and even in some cases at the WTO.

I speak here of removing unnecessary barriers to the flow of direct investments and to the operations of crossborder entities, of leveling the investment playing field by banning various performance requirements, and of advancing the protection of FDI against expropriation in each country to the level afforded domestic investors. All this would, of course, be subject to the sectoral or policy exclusions or reservations negotiated by each country.

If there are concerns that these exceptions and reservations could be so widespread as to make an agreement too limited in terms of practical application, separate negotiations could be launched toward the inclusion of a number of these sectors and policies in the agreement at a future date — although the success of these negotiations should not be a precondition to the investment agreement's seeing the light of day. The key here, of course, would be to have these negotiations cover a range of sectors or policies such that all participants would gain access to the others' markets in return for relaxing foreign investment constraints in their own. For Canada, this would mean, for example, targeting the many implicit or explicit investment barriers and performance requirement policies that remain in the United States (such as the *Merchant Marine (Jones) Act* and in the EU.[11]

At the same time as countries move forward on the above measures — which are what make an investment agreement necessary and worthwhile in the first place — they should re-evaluate those elements that cause concern about supranational intrusion in domestic affairs or about a possible race to the bottom in national standards. Or they should consider introducing other elements to the agreement that would balance out those concerns. In other words, the package needs to be unbundled and rebalanced.

The Dispute Settlement Process

The draft MAI would be far less contentious if it did not include binding dispute settlement between private investors and governments on the issue of expropriation. One expert observes that a response to the concern here could be to limit the use of dispute settlement mechanisms to quarrels between governments about the interpretation of the agreement.[12]

The problem with this view, as its author acknowledges, is that investor-state dispute settlement is actually a progressive idea, permitting impartial international panels or tribunals to adjudicate conflicts that would other-wise express themselves through the capture of trade or foreign policymaking in one country by private interests that feel aggrieved by conditions in another. Then the dispute becomes a government-to-government one, with the largest or richest country naturally having more chances to see its interests prevail.

Another problem with this view is that, although basic investor protection is now not a contentious issue in most countries of the world — they provide it because they see it as being in their own interest, not because they are forced to — the principle of no expropriation without compensation should still be a basic underpinning of a multilateral treaty that aims, over time, to replace existing bilateral agreements that do provide such protection. By definition, this protection is worth something (in terms of the benefits flowing from a more certain and transparent treatment of the investor) only if it can be enforced in the crunch.

Nevertheless, the mechanism could be made less subject to accusations that a corporate "rule" or an unrepresentative group of panelists is about to take away the power of governments to shape policy. One solution would be to make recourse to arbitration dependent on the consent of both parties involved, with governments that refuse required to make a complete and timely report of their reasons for doing so to trade ministers of other signatory countries.

A more effective approach would be to instruct dispute settlement panels and tribunals to render their decisions as if they were interpreting domestic laws, as NAFTA Chapter 19 requires for antidumping and countervailing-duty disputes. This system could be devised so that decisions would be quick and impartial, as well as public, but would preserve domestic laws in all essential respects.[13]

For this system to work, all participating countries would have to agree to — or at least accept in practice — the principle of no expropriation without compensation. Potentially, an international body, such as the International Monetary Fund, the United Nations Conference on Trade and Development, or the OECD itself, could devise some type of "readiness" indicators to determine that basic legal protections were strong enough within a country to permit it to become a signatory on par with the others. Ideally, achieving the main goals of an effective investment agreement should not require any signatory country to provide special protection or rules for foreign investors; rather, its domestic laws should protect all investors, foreign and domestic alike.

Other Issues

If necessary, some of the approaches suggested above could be applied to other contentious investment-related issues, such as the proper degree of protection for intellectual property rights. Here, dispute settlement could be made more explicitly interpretive of existing national laws or even nonbinding.

Although this last suggestion could be considered tame, note that the nonbinding nature of the dispute settlement process that existed during the first five decades of the GATT did not stop countries from publicly hauling each other onto the trade carpet with a fair degree of (mutual) success.

Greater Balance

Greater flexibility on the dispute settlement side should allay fears that measures in an investment treaty would encroach unduly on sovereignty or give large foreign corporations preferential treatment over domestic firms.

As well, governments could make any agreement more visibly balanced *vis-à-vis* some of the other criticisms that the draft MAI has incurred. I am thinking here of NAFTA-style side agreements, memoranda of understanding (MOUs), and nonbinding charters. They might be most useful regarding the maintenance of labor and environmental standards, but they could also include a general code of conduct for multinational corporations regarding respect for the domestic laws of countries in which they operate, and calling for generally high standards of conduct. As mentioned, guidelines to that effect already exist at the OECD, and they could be made formally part of the agreement. Indeed, Robert Howse suggests the possibility that only MNEs subscribing to such a code of conduct should have access to dispute settlement on investment matters.[14] As well, an MOU on the extraterritorial application of domestic laws and an intergovernmental code of conduct on subsidies are, in my view, ideas that need to be considered as part of any global investment negotiations.

An Investment Charter?

In the same vein, but further down the list of desirability, would be making an MAI or equivalent agreement a nonbinding investment charter rather than a treaty, a sort of experimental agreement that could be put into effect among OECD countries. Such an approach might circumvent a number of problems that have plagued the MAI negotiations. It would probably solve the problem of signatories' having to extend MFN treatment to all GATS signatories (because countries would not have to grant entry to their markets in areas where they perceive a significant problem with unilaterally opening up toward developing countries). It would give everyone a chance to see how such an agreement would work in practice — for example, in dispute settlement and compensation for expropriation. It would allow more room for an eventually binding agreement to "migrate" to the WTO, where the participation of developing countries could help shape it into a truly global pact (while still holding up a high standard that countries could sign on to when they feel ready to comply). And it would allow time for progress on other issues of the agenda that are inextrica-

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bly linked to investment issues, such as extraterritoriality, subsidies, and cultural policies.

Under this approach, members would formally consider every five years whether or not to make the treaty binding, in a vote that would require the agreement of a substantial majority of all signatories and of those representing a substantial portion of the group's gross domestic product (GDP). In the meantime, bilateral investment treaties could begin to be modeled after the agreement, as a step toward a more uniform set of global rules.

Other Forums

Finally, we should not forget that opportunities will automatically exist to revisit investment issues in other negotiating forums, since pressures for a broader, stronger investment regime stem from the fact of greater economic interdependence among countries. If they are not adequately addressed by further attempts to conclude an MAI at the OECD, they will likely be raised again in other multilateral or regional settings.

In particular, the WTO is set to decide next year whether to launch global negotiations on investment issues, and the Free Trade Area of the Americas (FTAA) negotiations launched in April 1998 under Canada's initial presidency will feature investment and related issues.

Many of the same issues that bogged down the MAI negotiations will likely resurface in these forums, with the added dimension of the involvement of many developing and/or smaller economies that were not involved in the MAI. Thus, it is crucial that governments be prepared to think creatively about what constitutes an acceptable package of investment measures.

Conclusion

In conclusion, recent negotiating experience suggests that efforts within the OECD to reach an MAI, should they continue, should focus on the alternatives identified above with respect to dispute settlement and a rebalancing of the issues covered by the agreement. These alternatives would likely surface anyway if the MAI negotiations falter for good, as investment issues will be discussed in a number of multilateral, regional, and sectoral forums over the next decade, involving both rich and developing countries.

Notes

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1 See, for example, "The Sinking of the MAI," *The Economist*, March 14, 1998, pp. 81–82.

2 United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 1997: Transnational Corporations, Market Structure and Competition Policy* (New York; Geneva: United Nations, 1997), especially pp. 4–5, 10–11, and annex tables B.3 and B.6; and author's calculations.

3 See International Monetary Fund, *Balance of Payments Statistics Yearbook* (Washington, DC: IMF, various issues).

4 Between 1982 and 1995, direct employment by US-based MNEs fell in the United States itself, while direct employment in Canada by US affiliates registered a tiny increase. *Survey of Current Business* (United States, Department of Commerce, Bureau of Economic Analysis), October 1997.

5 A common fallacy is to think that, because many direct and portfolio investments are made in existing firms, rather than in greenfield investments, they do not contribute to economic activity.

This view does not take into account what the (domestic) seller of the investment does with the money received, such as spending or reinvesting it, not to mention the increased potential rewards for entrepreneurs when the sale of their companies is not restricted to domestic purchasers.

6 UNCTAD, *World Investment Report 1997*, pp. 6–7, table I.2.

7 The quoted phrases in this list are from the model FIPA reproduced in E. Michael Power, *Foreign Investment Protection Agreements: A Canadian Perspective*, Investment Canada Working Paper 14 (Ottawa, April 1993), pp. 23–32: specifically, article II (4) ("fair and equitable treatment"); article IV ("to the extent possible and in accordance with [the host country's] laws and regulations"); and article VII ("for a public purpose...compensation"). The description of the Canadian model FIPA is on pp. 1–8.

9 Ibid., pp. 15–17. On the NAFTA's investment provisions, see Edward M. Graham and Christopher Wilkie, "Regional Economic Agreements and Multilateral Firms: The Investment Provisions of the NAFTA," in H. Mirza, ed., *Global Competitive Strategies in the New World Economy — Multilateralism, Regionalization and the Transnational Firm* (London: Edward Elgar, forthcoming).

10 Alan Larson, testimony before the United States Congress, House of Representatives, International Relations Committee, Subcommittee on International Economic Policy and Trade, March 6, 1998; reported in United States Information Services, *USIS Trade and the Economy Electronic Documents*, e-mail list, March 10, 1998.

11 High Level Meeting on the Multilateral Agreement on Investment, "Chairman's Conclusions," *OECD News Release*, Paris, February 18, 1998, p. 1.

12 On these barriers, see Canada, Department of Foreign Affairs and International Trade, *Register of United States Barriers to Trade, 1996* ([Ottawa, 1996]); and Someshwar Rao and Ash Ahmad, "Formal and Informal Barriers in the G-7 Countries," in Pierre Sauvé and Daniel Schwanen, eds., *Investment Rules in the Global Economy: Enhancing Access to Markets*, Policy Study 28 (Toronto: C.D. Howe Institute, 1996).

13 Lawrence Herman, "Why not make dispute settlement accessible to governments only? Rethinking the multilateral agreement on investment," *Financial Post*, April 8, 1998, p. 17.

14 And the decision of an international panel in this case could not likely be construed as depriving US citizens of their right to due process, as Judge Wilkey argued in the case of NAFTA panels that overturned US antidumping and countervailing duty decisions. The government action against which a panel could rule could not have been taken on behalf of a domestic private complainant in the first place (unlike the cases about which Judge Wilkey complained). On Judge Wilkey's view, see Michael I. Krauss, "Dispute Resolution and Judicial Institutions: Towards the Unraveling of Free Trade in North America?" (paper presented at the Conference on North American Economic Integration, Institute for Economic Conferences, Montreal, November 14, 1994).

15 Conversation with Robert Howse, May 13, 1998.

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