

NGOS, THE INTERNET AND INTERNATIONAL ECONOMIC POLICY MAKING: THE FAILURE OF THE OECD MULTILATERAL AGREEMENT ON INVESTMENT

JÜRGEN KURTZ*

[The research question posed by this article is how the Internet has affected the debate on whether to provide non-governmental organisations ('NGOs') with access to trade and investment negotiations. The article begins by summarising the key arguments for and against increased NGO participation. Within this debate, international lawyers have largely ignored the question of whether the Internet pushes the debate in either direction. This article offers a contribution to this gap in the analysis. The methodology employed in examining this question is that of a case study of the failed negotiations among the member states of the Organisation for Economic Cooperation and Development ('OECD') from 1995 to 1998 towards the Multilateral Agreement on Investment ('MAI'). The MAI was chosen because the OECD approach to negotiations was characterised by low levels of transparency and little scope for NGO participation. Further, the very active (and to some extent successful) campaign by NGOs against the MAI relied heavily on the Internet. The article finds that the MAI case study pushes the debate slightly in favour of greater NGO access to negotiations. Of itself, the Internet does not overcome the proper concerns of opponents based on questions of representativeness and accountability of NGOs. However, the article argues that these problems are counterbalanced to some degree by the expanded ability of electronically networked NGOs to assist in the sensitive process of conferring (or opposing) public approval and hence legitimacy for new agreements. The article concludes with some modest suggestions for greater transparency in negotiations as a response to these research findings.]

CONTENTS

- I Introduction
- II Background to the MAI Case Study
 - A Overview of Debate
 - B The Impact of the Internet on NGOs: Some Conceptual Thoughts
- III The MAI Episode
 - A Overview
 - B The MAI Provisions
 - 1 Scope of Application: Definition of Investment
 - 2 Investment Liberalisation
 - 3 Investment Protection
 - 4 Dispute Settlement
- IV The NGO 'Stop MAI' Campaign
 - A Overview and Typology
 - B Structure of the Campaign: NGOs as 'Network Guerillas'?

* BA, LLB (Hons), LLM (Melbourne); Lecturer, Faculty of Law, The University of Melbourne; Emile Noël Fellow, Jean Monnet Center for International and Regional Economic Law & Justice, Law School, New York University. This article was written during my Emile Noël fellowship at New York University Law School. I thank Professor JHH Weiler of New York University Law School for that valuable and rewarding opportunity and his support for this work. I also thank Professor Gillian Triggs of The University of Melbourne Faculty of Law for her insightful views on various components of this article. All errors remain, of course, my own.

- C Substance of the Campaign: NGOs as Intellectual Competitors?
 - 1 The MAI as an Instrument of Economic Globalisation
 - 2 The MAI as a Facsimile of NAFTA Chapter 11
- D The OECD Response: Too Little Too Late
 - 1 Transparency
 - 2 Participation
- E Obstructive and Constructive Outcomes of the NGO Campaign
- V Conclusion

I INTRODUCTION

In recent years, the work of international economic organisations like the World Trade Organization ('WTO') has come under increasing attack from non-governmental organisations ('NGOs'). Much of this concern has focused on the perceived impact of trade and investment agreements on issues as diverse as the environment, labour standards and human rights. NGO demands for increased involvement in the work of these organisations have reaped some dividends. For example, NGOs have increasingly sought and attained limited rights to submit *amicus curiae* briefs within the dispute settlement process of the WTO¹ and Chapter 11 of the North American Free Trade Agreement.² However, most member states have stringently opposed the involvement of NGOs in the legislative or policy processes of international economic organisations. A fundamental tenet of this opposition is the idea that NGOs, unlike national governments, are not sufficiently representative of the broader public in member states to justify their involvement in trade and investment negotiations. At the same time, proponents of greater NGO involvement counter this opposition under the general rubric of legitimacy. They point out that the case for inclusion is not based on whether NGOs are representative but on their ability to enhance the quality of the decision-making process by acting as 'intellectual competitors' or 'policy entrepreneurs'.³ A related argument is that NGOs may be able to act as a form of 'connective tissue' between organisations like the WTO and the

¹ *European Communities — Measures Affecting Asbestos and Asbestos-Containing Products: Additional Procedure Adopted under Rule 16(1) of the Working Procedures for Appellate Review*, WTO Doc WT/DS/135/9 (8 November 2000) (Report of the Appellate Body) [50]–[57].

² *North American Free Trade Agreement*, opened for signature 17 December 1992, 32 ILM 289 (1993) (entered into force 1 January 1994) ('NAFTA'). Chapter 11 prescribes rules on investment liberalisation, protection and dispute settlement to apply among Canada, Mexico and the US, the three member states of NAFTA. Section B of ch 11 gives an investor from a NAFTA state the right to bring an arbitral proceeding for breach by any of the NAFTA states of the substantive rules in ch 11. The ability of a NAFTA arbitral tribunal to accept *amicus curiae* briefs was affirmed in NAFTA ch 11 Arbitration, *United Parcel Service of America Inc v Government of Canada: Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae* (17 October 2001) <http://www.dfait-maeci.gc.ca/tna-nac/IntVent_oct.pdf> at 23 September 2002.

³ Daniel Esty and Damien Geradin, 'Regulatory Co-Opetition' in Daniel Esty and Damien Geradin (eds), *Regulatory Competition and Economic Integration: Comparative Perspectives* (2001) 30, 44–6; Steve Charnovitz, 'Opening the WTO to Nongovernmental Interests' (2000) 24 *Fordham International Law Journal* 173, 209; Daniel Esty, 'Linkages and Governance: NGOs at the World Trade Organization' (1998) 19 *University of Pennsylvania Journal of International Economic Law* 709, 720–2.

broader public.⁴ This ability to assist in the conferral of legitimacy is seen as increasingly important as liberalisation efforts move beyond a focus on tariffs (and their easily quantifiable benefits) to the more difficult and controversial task of removing discriminatory, behind-the-border regulatory measures.

However, what is largely missing in the debate amongst international lawyers is an analysis of the impact of the Internet on these questions.⁵ On occasion the impact of the Internet is hinted at but there is little substantive analysis.⁶ At most, some commentators argue that the Internet may broaden participatory opportunities for developing country NGOs.⁷ This article offers a contribution to the gap in the analysis. The subject of the article is the way in which the Internet affects the advocacy efforts of NGOs, and given this, the ability of economic organisations like the WTO to continue to oppose greater NGO involvement in legislative and policy processes. The underlying research question is to what extent the Internet has pushed the debate in either direction.

The methodology that will be used is that of a case study of the failed negotiations among the member states of the Organisation for Economic Cooperation and Development ('OECD') from 1995 to 1998 towards the Multilateral Agreement on Investment ('MAI'). The case study has been chosen for two reasons. Firstly, the OECD approach in the MAI negotiations was a traditionally statist one with relatively low levels of transparency and few participatory opportunities for NGOs. Secondly, the very active (and to some extent successful) campaign by NGOs against the MAI relied heavily on the Internet. Thus the MAI case study offers a useful prism through which to consider the impact of the Internet on NGOs and the future utility of a largely statist approach to trade and investment negotiations. The relevance of the MAI case study is further heightened by the inclusion of investment rules on the negotiating agenda to come out of the Doha WTO Ministerial Conference in November 2001.⁸ Moreover, negotiations towards a regional investment

⁴ Esty, 'Linkages and Governance', above n 3, 725–6.

⁵ In other disciplines, such as the social sciences, the role of the Internet in enabling NGOs to network across national borders has generated a variety of perspectives among scholars. See, eg, Richard Higgott, Geoffrey Underhill and Andreas Bieler (eds), *Non-State Actors and Authority in the Global System* (2000); Manuel Castells, *The Information Age: Economy, Society and Culture — Volume II: The Power of Identity* (1997); Paul Nelson, 'Internationalising Economic and Environmental Policy: Transnational NGO Networks and the World Bank's Expanding Influence' (1996) 25 *Millennium Journal of International Studies* 605; Ronnie Lipschutz, 'Reconstructing World Politics: The Emergence of Global Civil Society' (1992) 21 *Millennium Journal of International Studies* 389.

⁶ See, eg, Sylvia Ostry, 'World Trade Organization: Institutional Design for Better Governance' in Roger Porter et al, *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium* (2001) 361, 365: 'While economists, businesspeople, and trade officials ponder how e-commerce will affect the market for goods and services, few seem to have given much thought [sic] to how the Internet will affect the market for policy ideas and the policymaking process.'

⁷ See, eg, Esty, 'Linkages and Governance', above n 3, 725–6: 'Other observers argue that a greater role for NGOs at the WTO might exacerbate the existing bias toward Northern viewpoints ... the advantage of a physical presence in Geneva is diminishing as modern information technologies allow groups throughout the world to monitor and contribute to WTO debates.'

⁸ *Doha WTO Ministerial Conference 2001: Ministerial Declaration*, WTO Doc WT/MIN(01)/DEC/1 (2001) [20]–[22].

initiative within the Free Trade Area of the Americas are currently on foot, with particular emphasis on transparency and opportunities for NGO participation.⁹

The article will be organised as follows. Part II offers some background material. It charts some of the main themes underlying the debate on whether to provide NGOs with opportunities to participate in trade and investment negotiations. This section also examines at a conceptual level the impact of the Internet on NGOs and on this debate. Part III then describes the MAI episode. It is necessary to do so in some detail as several of the NGO concerns about the MAI focused on its problematic similarities with the provisions of Chapter 11 of *NAFTA*. Part IV examines the NGO campaign against the MAI, the use of the Internet and the OECD response. Part V offers some suggestions and conclusions.

II BACKGROUND TO THE MAI CASE STUDY

A Overview of Debate

Scholarly debate on the question of NGO involvement in trade and investment negotiations is voluminous.¹⁰ The focus of this article will be primarily on the MAI case study. As a starting point, however, it is important to distil the key themes surrounding the existing debate before attempting to discern lessons from the MAI case study.

The primary argument put forward for limiting greater engagement with NGOs in negotiations is the idea that, unlike national governments, NGOs are not sufficiently representative of the broader public. A single-issue NGO is unlikely to engage in the complicated balancing of public (and sometimes opposing) interests expected of representatives of democratically elected national

⁹ The Free Trade Area of the Americas ('FTAA') is a draft agreement to liberalise trade, investment and other restrictions currently being negotiated amongst 34 states in the Americas. Negotiations towards the FTAA formally commenced in 1998. The draft negotiating text was publicly released on the FTAA website in 2001: FTAA, *FTAA Draft Agreement*, FTAA Doc FTAA.TNC/w/133/Rev.1 (2001) <<http://www.ftaa-alca.org>> at 23 September 2002. Furthermore, in 1998 (which also marked the cessation of negotiations towards the MAI), the FTAA Trade Ministers established a Committee of Government Representatives on the Participation of Civil Society to receive input from NGOs on the FTAA process. Since that date, the Committee has canvassed the views of a variety of NGOs in the region and released two reports: see FTAA Committee of Government Representatives on the Participation of Civil Society, *Report of the FTAA Committee of Government Representatives on the Participation of Civil Society*, FTAA Doc FTAA.soc/03 (1999) <<http://www.ftaa-alca.org/spcomm/derdoc/cs3e.doc>> at 23 September 2002; FTAA Committee of Government Representatives on the Participation of Civil Society, *Report of the Committee of Government Representatives on the Participation of Civil Society in the FTAA Process*, Doc No FTAA.soc/08/Rev.1 (2001) <<http://www.ftaa-lca.org/spcomm/derdoc/dcs8r1e.doc>> at 23 September 2002.

¹⁰ For a comprehensive summary of the opposing 'statist' (for exclusion of NGOs) and 'individualist' (for greater consultation and cooperation with NGOs) perspectives, see Charnovitz, above n 3, 197–213.

governments.¹¹ As a related issue, opponents point to the developed country origin and bias of most NGOs.¹² Opponents of greater engagement also use a narrower argument based on the inter-governmental structure of organisations like the WTO. This is linked to the idea that there is a separation of areas of influence between the national and international levels. This perspective does not deny NGOs the right to influence decision-making, but argues that it should be done solely at the national level.¹³

Aside from issues of representation, there is the difficult problem of accountability. To whom are NGOs really accountable? What is there to stop NGOs putting forward a deliberately obstructive (and unsubstantiated) critique of a proposed negotiation? This issue centres partly on the transparency of the internal structures of NGOs and especially on whether there is some form of democratic decision-making process to enable members to elect (and remove) leaders within an NGO.

These substantive problems of representation and accountability are also supplemented by more instrumental reasons for limiting greater engagement with NGOs. Secrecy in negotiations (and exclusion of NGOs) is often justified by the need to reach consensus between the negotiating partners.¹⁴ Further, it is suggested that opening the process to NGOs would lead to a floodgates problem with negotiations being swamped by NGO demands. On these two significant objections, there does seem to be an unstated tendency to equate greater NGO involvement with direct participation in negotiations. This is not, of course, the only option. There is an entire spectrum of ways to increase NGO access to

¹¹ However, the contrary argument is often put forward that NGOs in fact act as alternative, even preferable, identity references for citizens on specific issues. This is linked to the idea that, with the Internet, it is increasingly possible for people to choose multiple identity references that go beyond the geographical political jurisdiction in which they live. In this respect, an NGO may be a more accurate reflection of an individual's personal views than the organs of authority in his or her state. For example, an Australian citizen who cares deeply about debt relief for heavily indebted countries may see their interests better represented by a specific interest international NGO than by the Australian Government, which has many goals that must simultaneously be pursued. See generally Oscar Schachter, 'The Decline of the Nation-State and Its Implications for International Law' (1997) 36 *Columbia Journal of Transnational Law* 7; Thomas Franck, 'Clan and Superclan: Loyalty, Identity and Community in Law and Practice' (1996) 90 *American Journal of International Law* 359. This approach may assist when considering single-issue negotiations. However, its utility is less clear when considering multi-issue trade and investment negotiations that typically involve a complicated balancing of reciprocal concessions to achieve consensus amongst negotiating partners.

¹² It is clear that many developing countries view some NGOs as 'hostile to their interests'. This is particularly the case for NGOs that advocate the inclusion of minimum labour and environmental standards in trade and investment agreements. For developing countries, these efforts are often seen as inimical to their areas of legitimate comparative advantage: Roger Porter, 'Efficiency, Equity and Legitimacy: The Global Trading System in the Twenty-First Century' in Roger Porter et al, *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium* (2001) 3, 14. See also Jagdish Bhagwati, 'After Seattle: Free Trade and the WTO' in Roger Porter et al, *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium* (2001) 50, 61–2.

¹³ Bhagwati, above n 12, 61–2.

¹⁴ For a useful analysis of what the authors characterise as the traditional 'club model' of negotiating trade and investment agreements, see Robert Keohane and Joseph Nye, 'The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy' in Roger Porter et al, *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium* (2001) 264, 265–72.

negotiations without moving to the extreme position of giving NGOs a seat at the negotiating table.¹⁵ A modest advance on this issue, for example, would be the simple but possibly effective step of increasing transparency in negotiations.

Against these objections, proponents of further NGO involvement essentially rely on two arguments. First, they focus on the increased NGO participation believed to flow from the ability of NGOs to act as ‘intellectual competitors’ or ‘policy entrepreneurs’.¹⁶ This point is grounded in the expertise NGOs may have in their chosen subject area. Secondly, proponents use a powerful legitimacy argument to justify greater NGO access to policy making. For most of its history, the legitimacy of the *General Agreement on Tariffs and Trade*¹⁷ rested on its effectiveness in delivering gains through trade liberalisation (and especially tariff reduction). However, since the end of the Uruguay Round of trade negotiations in 1994, the work of the newly created WTO has moved beyond tariff liberalisation to encompass rules on such diverse issues as services, intellectual property, and investment. WTO rules on these areas potentially conflict with a host of domestic regulatory measures that may incidentally act in a discriminatory manner but are often passed for legitimate public policy reasons. Increasingly, public support will be needed to justify encroachment into these sensitive, behind-the-border regulatory measures. Recognising that NGOs can act as a ‘connective tissue’ with the broader public, greater NGO involvement in negotiations is seen as a way of strengthening public support for, and hence the legitimacy of, the work of bodies like the WTO.¹⁸

This necessarily brief overview highlights the key arguments raised on either side of the debate. The next section will examine, on a conceptual level, the impact of the Internet on some of the points raised for and against greater NGO involvement in trade and investment negotiations. It will do so firstly by examining the background and key features of the Internet that are pertinent to NGO advocacy efforts.

B *The Impact of the Internet on NGOs: Some Conceptual Thoughts*

The origins of the Internet can be traced to the 1960s when the US Defense Department’s Advanced Research Projects Agency began work on a

¹⁵ For a variety of suggestions on this point including giving NGOs observer and consultative status in negotiations, see Robert Housman, ‘Democratizing International Trade Decision-Making’ (1994) 27 *Cornell International Law Journal* 699, 741–3.

¹⁶ See above n 3. See also Daniel Esty, ‘Nongovernmental Organizations at the World Trade Organization: Cooperation, Competition or Exclusion’ (1998) 1 *Journal of International Economic Law* 123, 136–7; Steve Charnovitz, ‘Participation of Nongovernmental Organizations in the World Trade Organization’ (1996) 17 *University of Pennsylvania Journal of International Economic Law* 331, 342–3.

¹⁷ The GATT comprises the text of the original *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187, together with a number of instruments and decisions of the contracting parties to GATT as maintained in force by the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A (*General Agreements on Tariffs and Trade*) 1867 UNTS 190 (‘GATT’).

¹⁸ William Reichert, ‘Resolving the Trade and Environment Conflict: The WTO and NGO Consultative Relations’ (1996) 5 *Minnesota Journal of Global Trade* 219, 231; Esty, ‘Linkages and Governance’, above n 3, 719.

communications system invulnerable to nuclear attack.¹⁹ The basic idea was to develop a communications network independent of any central control so that message data would find its own route along the network and be capable of reassembly at any point within the network. The design of this form of technology makes it very difficult to censor or control information released on the network. This aspect of the original design still remains. The Internet is largely unregulated and there is no watchdog or editorial control over its content. The steady reduction in price of personal computers through the 1980s began to broaden the wider community's access to the Internet.²⁰ However, despite growing rates of access, the Internet remains primarily a tool of communication open to citizens of the developed world. As of March 2000, only 0.3 per cent of the population in Africa was connected to the Internet in comparison to 44.3 per cent of the population in North America.²¹

The structural feature of the Internet as an inherently open and instantaneous communications device raises a preliminary but important point. Aside from the end of the Cold War and consequent spread of democratic norms,²² the Internet has dramatically increased public expectations of transparency. Citizens of developed countries now expect to a large degree to find information on any topic on the Internet. The Internet 'is making the market for ideas contestable'.²³ Consequently, it is becoming more difficult for negotiators to limit the public release of information on the grounds that secrecy is necessary to achieve consensus in negotiations. This has particularly empowered those NGOs who have often used increased expectations of transparency as fundamental bases of their advocacy campaigns.²⁴

The Internet also clearly expands the areas of influence of advocacy NGOs. The geographic reach of the Internet enables NGOs which have a common ideological aim but are located in different countries to share information and coordinate their campaigns. Prior to the development of the Internet, this form of coordination required traditional forms of communication (such as phone,

¹⁹ Manuel Castells, *The Information Age: Economy Society and Culture — Volume I: The Rise of the Network Society* (1996) 351.

²⁰ For example, the price of a computer with processing power of 4.5 million instructions per second fell from US\$4.5 million in 1980 to US\$100 000 in 1990: UN Conference on Trade and Development ('UNCTAD'), *World Investment Report 1993: Transnational Corporations and Integrated International Production* (1993) 25.

²¹ UN Economic and Social Council, *Development and International Cooperation in the Twenty-First Century: The Role of Information Technology in the Context of a Knowledge-Based Global Economy: Report of the Secretary-General*, UN Doc E/2000/52 (18 May 2000) 18.

²² The challenge of the spread of democratic norms to the 'club model' of negotiating trade and investment agreements is analysed in Keohane and Nye, above n 14, 271–2.

²³ Ostry, above n 6, 365.

²⁴ For example, in 1994 over 150 NGOs began a campaign to spur greater openness and accountability by the World Bank under the theme '50 Years Is Enough': Jan Scholte, 'In the Foothills: Relations between the IMF and Civil Society' in Richard Higgott, Geoffrey Underhill and Andreas Bieler (eds), *Non-State Actors and Authority in the Global System* (2000) 256, 263. A measure of the success of that transparency campaign is the fact that by 1997, about 50 per cent of the Bank's lending projects had some provision for NGO involvement. This is up from an average of only six per cent between 1973 and 1988: World Bank, *Cooperation between the World Bank and NGOs: FY97 Progress Report* (1998) figure 1.

facsimile or even transport to effect personal meetings) that are relatively expensive. In contrast, the Internet now enables these types of NGOs to network electronically across national borders through email, bulletin board systems and sites on the World Wide Web. This capacity to network may possibly enhance the ability of NGOs to act as intellectual competitors to intergovernmental bodies by sharing information and analyses. It also clearly reduces the prospect (and thereby cost) of duplication of activities between different NGOs.

Aside from its organisational features, the Internet also increases the ability of NGOs to interface with and possibly influence the public. The Internet enables NGOs to disseminate information to the broader public quickly and at little or no cost. Again, prior to the Internet, NGOs relied on old media forms of communication to convey their message. Whether this be radio, television or the print media, the cost of access has previously acted as a barrier to some NGO activity. In contrast, the interwoven nature of the World Wide Web provides an exceptionally effective dissemination process. Whatever strikes a chord is picked up and repeated through networks of NGOs sharing a common goal.

However, it is difficult to see how the Internet overcomes some of the resistance to greater NGO involvement, especially that based on concerns of accountability and developed country bias. A key feature of the Internet is that it remains technologically open, enabling widespread public access without any real governmental or commercial restriction. For NGOs, this means that their message can be conveyed without fear of censorship or other forms of governmental control. However, as it is largely unregulated, anything can appear on the Internet, from conspiracy theories or rumours to outright lies. NGOs are not necessarily forced to prove the accuracy and substance of their claims on websites that they set up and control. This is in contrast to their ability to access older, mainstream information systems such as print, radio or television media. Dissemination of information or an argument through these forms of media would normally be restricted on two grounds: first, on cost, and secondly, on the fact that access to older forms of information systems are generally subject to the approval of an editorial gatekeeper. The problems of the so-called digital divide are also clear. Rates of penetration of Internet access skew the use of this important tool in favour of developed country organisations.²⁵

Thus the Internet would seem on first principles to enhance some advantages of increased NGO cooperation put forward by proponents of greater access to NGO participation, whilst exacerbating some of the fears of opponents. The underlying research question then moves to the quantitative effect of the use of the Internet by NGOs and the extent to which that use pushes the debate in either direction. The next parts of the article will attempt to quantify this impact by examining the case study of the NGO campaign against the MAI.

²⁵ UN Economic and Social Council, above n 21, 17.

III THE MAI EPISODE

A Overview

In 1991 the OECD commenced work on the idea of a multilateral agreement on investment.²⁶ The decision to study the possibility of such an agreement was driven by three factors: rapid growth in investment flows by the early 1990s, the trend towards unilateral liberalisation of national restrictions on foreign investment, and the absence of a comprehensive investment agreement at the international level.²⁷

The results of the technical analysis were presented as a report to the OECD Council of Ministers in May 1995.²⁸ The report concluded that ‘the foundations have now been laid for the successful negotiation of [a MAI] building on OECD’s existing instruments and expertise’.²⁹ Based on this report, the OECD Council agreed to commence negotiations towards a MAI with the mandate that the agreement was to:

- provide for a broad multilateral agreement for international investment with high standards for the liberalization of investment regimes and investment protection with effective dispute settlement procedures;
- be a free-standing international treaty open to all OECD Members and the European Communities and to accession by non-OECD Member countries, which will be consulted as negotiations progress.³⁰

The first part of the mandate highlights the relatively limited scope of the MAI exercise. It was primarily designed to build upon existing OECD instruments to set ‘high standards’ on established norms of investment liberalisation and protection backed up by an effective process of dispute settlement.³¹ The conception of the MAI was thus of an agreement which would strengthen and multilateralise existing disciplines in bilateral investment treaties³² as well as regional investment agreements such as Chapter 11 of *NAFTA*.

²⁶ OECD, *A Multilateral Agreement on Investment: Report by the Committee on International Investment and Multinational Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT)* (1995) annex (‘CIME/CMIT Report’). On 19 February 2002 the OECD publicly released a large quantity of documents relating to the MAI negotiations (including the last version of the draft negotiating text) on its website: OECD, *Multilateral Agreement on Investment: Documentation from the Negotiations* <<http://www.oecd.org/daf/mai>> at 23 September 2002.

²⁷ For a discussion of each of these factors, see *CIME/CMIT Report*, above n 26, ch 1.

²⁸ *Ibid.*

²⁹ *Ibid* intro.

³⁰ *Ibid* ch 3.

³¹ *Ibid* ch 2.

³² Since the late 1960s, bilateral investment treaties (‘BITs’) have become primary instruments for reaching agreement on foreign investment between developed and developing countries. See generally United Nations Conference on Trade and Development, *World Investment Report 1996: Investment, Trade and International Policy Arrangements* (1996) 147–8 (figures V.2 and V.3 chart the exponential growth of BITs from 1959 to 1996). From less than 200 completed at the end of the 1960s, the number of BITs had grown to a total of 1941 by the end of 2000: UNCTAD, *World Investment Report 2001: Promoting Linkages* (2001) 6–7. For a comprehensive discussion of the use and coverage of BITs, see Rudolf Dolzer and Margrete Stevens, *Bilateral Investment Treaties* (1995).

Yet within the mandate there is no reference to any involvement of or consultation with NGOs.³³ This exclusion may, in part, have been linked to the choice of the OECD as the forum for the MAI negotiations. Unlike the WTO, the OECD has a relatively limited membership base principally comprising developed states.³⁴ The United States was strongly in favour of having the OECD as the forum for the MAI negotiations.³⁵ The basis for the US preference for the OECD appears to be linked to the relatively modest results on investment from the Uruguay Round of GATT/WTO negotiations, which were often attributed to the recalcitrance of developing states.³⁶ The MAI was intended to avoid this problem by negotiating strong, comprehensive rules amongst supposedly like-minded countries.³⁷ If developing countries were to be excluded from negotiations due to the concern that their demands would dilute the MAI commitments, it is not surprising that there was no role planned for NGOs in the negotiation process.

Aside from neglecting the question of some form of NGO participation, there was also no reference to the role of transparency in the upcoming negotiations or

³³ The only reference to NGOs in the mandate was: ‘The business community and labour, represented by BIAC and TUAC, strongly support a MAI which sets high standards and a balanced and equitable framework for dealing with investment issues’: OECD, *CIME/CMIT Report*, above n 26, ch 1. The Business Industry Advisory Council (‘BIAC’) and the Trade Union Advisory Council (‘TUAC’) are two NGOs that have close historical links to the OECD and who have been granted consultative status with the OECD. Their role in the MAI negotiations will be examined further in Part IV(D)(2)(b) of this article.

³⁴ During the negotiations towards the MAI from 1995 to 1998, there were 29 member states of the OECD. These were Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, the Republic of Korea, Luxembourg, Mexico, Poland, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the UK and the US. The OECD also identified certain countries as likely candidates for accession and invited them to sit in as observers at the negotiations in 1997 and 1998. These were initially Argentina, Brazil, Chile, Hong Kong, China and the Slovak Republic. Three Baltic countries — Estonia, Latvia and Lithuania — were also later invited to join as observers: OECD, *Multilateral Agreement on Investment: Report by the Chairman of the Negotiating Group* (1998) 3.

³⁵ The role of the US in spearheading negotiations within the OECD is examined in Elizabeth Smythe, ‘Your Place or Mine? States, International Organizations and the Negotiation of Investment Rules’ (1998) 7 *Transnational Corporations* 85, 101. The author bases her various assertions, in part, on interviews conducted with MAI negotiators.

³⁶ In the lead up to the start of the Uruguay Round of trade negotiations in 1986, the US put forward a proposal for a comprehensive investment agreement in the GATT. This was resisted by developing countries so that by the end of the Uruguay Round negotiations in 1994, only two of the final 50 legal instruments to result include direct provisions dealing with foreign investment issues. These are the *Marrakesh Agreement Establishing the World Trade Organisation*, above n 17, annex 1A (*Agreement on Trade-Related Investment Measures*) 1868 UNTS 186 ; and annex 1B (*General Agreement on Trade in Services*) 1869 UNTS 183. Both of these agreements only deal with investment in a fragmented manner through an issue or sector-specific approach. See Terence Stewart (ed), *The GATT Uruguay Round: A Negotiating History (1986–1992)* (1993) 2069–70, 2354–8 (on US proposals and developing country resistance); see also (on developing country opposition) Murray Gibbs and Mina Mashayeki, *The Uruguay Round of Negotiations on Investment: Lessons for the Future* (1998) 16. See generally Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (2nd ed, 1999) 358.

³⁷ Although non-OECD countries were excluded from negotiations, the mandate for the MAI negotiations in 1995 explicitly envisaged their accession: OECD, *CIME/CMIT Report*, above n 26, ch 3.

the need to publicise the benefits that would flow from such a liberal initiative.³⁸ There seems to have been an expectation that the broader public would simply share the assumption of the negotiators as to the benefits of investment liberalisation.³⁹ This proved to be a critical mistake. Economic liberalism is subject to a chronic weakness; there are few, if any, countries in which there is a well supported political party or movement that makes classic liberalism its central body of doctrine.⁴⁰ Despite the fact that the aim of liberal policies is to enhance the public interest, the advocacy of those policies is normally an unpopular one.⁴¹ Indeed, in their campaign against the MAI, NGOs based much of their opposition on unsupported claims that revolved around an anxiety about economic globalisation and contested the benefits that flow from foreign investment into a host state.⁴²

The view of the MAI at its inception as a somewhat technical exercise of building upon existing norms is also reflected in the time frame allocated for the conclusion of negotiations. The report set an objective of two years for the conclusion of negotiations in time for the meeting of the OECD Council of Ministers in 1997.⁴³ This two-year time frame proved overly ambitious.⁴⁴ Two problem areas soon arose.

The first was internal, as the political commitment of the OECD member states to the liberalisation commitments within the MAI began to erode. Ongoing disputes between the US, Canada and the European Union began to shadow negotiations. The MAI negotiators found it impossible to resolve three particular issues: the extraterritorial impact of the *Cuban Liberty and Democratic*

³⁸ UNCTAD, *Lessons from the MAI*, UN Doc UNCTAD/ITE/IIT/MISC.22 (1999) 23.

³⁹ *Ibid.*

⁴⁰ For a concise description of this tension, see David Henderson, *The Changing Fortunes of Economic Liberalism: Yesterday, Today and Tomorrow* (1999) 58.

⁴¹ See, eg, William Coleman, 'Economists are Seriously Unpopular', *Australian Financial Review* (Sydney, Australia), 19 February 2001, 35; Graham Young, 'Anger and Discord Threaten Prosperity', *Australian Financial Review* (Sydney, Australia), 20 February 2001, 51.

⁴² See discussion below Part IV(C)(1).

⁴³ OECD, *CIME/CMIT Report*, above n 26, ch 3.

⁴⁴ Aside from the delays that developed within the MAI negotiations, history has shown that negotiations towards multilateral investment instruments proceed slowly, if at all. Within the WTO, negotiations towards the *Agreement on Trade-Related Investment Measures* (which only deals with performance requirements and excludes other forms of regulatory impediments imposed on foreign investors) were only concluded after what has been described as 'five years of tough negotiation': John Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (1995) 309.

Solidarity (Libertad) Act of 1996 (US),⁴⁵ the desire of France and Canada (opposed by the US) to include a general exemption for culture in the MAI,⁴⁶ and the EU proposal for an exemption for regional economic organisations.⁴⁷

The second problem is the subject of this case study: the onset of an aggressive campaign by NGOs opposing the MAI in early 1997. A striking feature of the structure of this campaign was the use of the Internet to coordinate and link up a vast array of NGOs opposed to the MAI. As indicated earlier, many NGOs opposed the MAI as the latest embodiment of the contested process of economic globalisation. But they also attacked the MAI by way of a more substantive critique of the problematic similarities between its provisions and the *NAFTA* Chapter 11 model.

These difficulties caused the negotiations to outrun the original two-year completion date. At the OECD Ministerial Council meeting in May 1997, the Ministers agreed to extend the completion date of negotiations to the May 1998 Ministerial Meeting. Critically, this decision provided NGOs opposing the MAI time in which to organise their campaign against the agreement. Furthermore, by 1998, the political climate that led the OECD to commence MAI negotiations had changed dramatically. By that year, the world witnessed in South East Asia 'the strongest financial panic since the Great Depression'.⁴⁸ The currency crisis

⁴⁵ 22 USC § 6021 (2000) (*Helms Burton Act*). In the middle of the MAI negotiations in March 1996, the *Helms Burton Act* entered into law in the US. Title III of the *Helms Burton Act* allows US citizens and corporations whose property was expropriated by the Cuban Government any time after 1 January 1959 to sue for damages against anyone who 'traffics' in their former property after 1 November 1996. Title IV prohibits entry into the US by persons who 'traffic' in confiscated property after 12 March 1996. The *Helms Burton Act* led to a fierce policy conflict between the US, Canada and the EU in the middle of the MAI negotiations. The underlying problem was that the *Helms Burton Act* potentially operated both extraterritorially and in a discriminatory manner against foreign investors from non-US states operating in Cuba. After the filing of a complaint by the EU against the US in the WTO, an understanding was eventually reached on this issue between the US and EU in May 1998 (which also envisaged amendments to the MAI negotiating text). But by that time, the Lalumière Commission had already begun its investigation into the MAI, leading to France's withdrawal from negotiations in October 1998. It is notable that the conflict over the *Helms Burton Act* shadowed the MAI episode from early in the negotiations in 1996 right up until 1998. See generally EU-US, *Understanding with Respect to Disciplines for the Strengthening of Investment Protection* (18 May 1998) <<http://www.eurunion.org/partner/summit/Summit9805/invest.htm>> at 23 September 2002; Edward Graham, *Fighting the Wrong Enemy: Antiglobal Activists and Multinational Enterprises* (2000) 28.

⁴⁶ The proposed exception would preserve the right of a Contracting Party to take any measure to regulate investment of foreign companies and the conditions of activity of those companies, in the framework of policies designed to preserve and promote cultural and linguistic diversity. This proposal was strongly opposed by US entertainment and media interests (the second largest US export industry): OECD, *The MAI Negotiating Text (as of 24 April 1998)* (1998) 128 <<http://www.oecd.org/pdf/M00003000/M00003291.pdf>> at 23 September 2002 (*MAI Negotiating Text*). See also William Dymond, 'The MAI: A Sad and Melancholy Tale' in Fen Hampson, Michael Hart and Martin Rudner (eds), *Canada among Nations 1999: A Big League Player?* (1999) 35. William Dymond was Canada's Senior Trade and Investment Negotiator to the OECD on the MAI.

⁴⁷ This proposal exempted defined regional economic organisations from the most-favoured-nation ('MFN') obligation under the MAI. This clause was strongly opposed by the US, which argued that exemptions from the MFN standard should only be permitted as listed country-specific exceptions: OECD, *MAI Negotiating Text*, above n 46, 118–19; UNCTAD, *Lessons from the MAI*, above n 38, 14–15.

⁴⁸ OECD Development Centre, 'After the Great Asian Slump: Towards a Coherent Approach to Global Capital Flows' (1999) 16 *OECD Policy Brief* 5.

affecting the Thai baht in July 1997 led to a dramatic drop in loan finance and portfolio investment going into Indonesia, Korea, Malaysia and to some extent the Philippines over the course of 1998.⁴⁹ Comparatively, flows of foreign direct investment ('FDI'), which is usually longer-term and marked by some degree of control over the foreign enterprise, proved to be relatively stable.⁵⁰ In September 1998 Malaysia imposed controls on some capital outflows in response to the crisis.⁵¹ Two weeks prior to the Malaysian announcement, Russia had not only imposed controls on capital outflows but had also defaulted on its loan obligations by announcing a 90-day moratorium.⁵²

Against these dramatic changes in the global economy, the prospects for the MAI as a treaty that aimed to liberalise all forms of capital flow looked less certain.⁵³ Contrary to past practice, the MAI became the single focus for discussion at the April 1998 OECD Ministerial Meeting.⁵⁴ Ministers reaffirmed 'the importance they [attached] to achieving a comprehensive multilateral framework for investment' but went on to announce 'a period of assessment and further consultation between the negotiating parties and with interested parts of their societies' in preparation for the next meeting of the negotiators in October 1998.⁵⁵

However, by that time the NGO campaign had succeeded in raising public opposition to the MAI. Five prominent member states of the OECD had instituted parliamentary reviews of the MAI.⁵⁶ The review commissioned by the French Government was highly critical of both the negotiation procedure and provisions of the MAI.⁵⁷ This report, coupled with a strong concern as to the treatment of cultural industries under the MAI, led to France's withdrawal from negotiations on 14 October 1998 (one week before the MAI negotiations were set to resume). The French withdrawal signalled the death knell for the

⁴⁹ Ibid 9.

⁵⁰ See generally WTO, *Annual Report 1999* (1999) 8, 28–30; UNCTAD, *World Investment Report 1999: Foreign Direct Investment and the Challenge of Development* (1999) 161–2; UNCTAD, *World Investment Report 2000: Cross-Border Mergers and Acquisitions and Development* (2000) 17–23. These sources detail statistics evidencing the stability of FDI (in terms of outflows) when compared to other forms of capital in the period following the Asian financial crisis.

⁵¹ These measures were aimed primarily at short-term capital flows such as portfolio investment undertaken by hedge funds and other institutional investors. The restrictions explicitly excluded FDI, which was something that the Malaysian authorities were at pains to publicise: International Monetary Fund and World Bank Group, 'Statement by Dato Mustapa Mohamed, Second Finance Minister of Malaysia' (Press Release, 6–8 October 1998).

⁵² OECD Development Centre, above n 48, 21.

⁵³ The MAI definition of investment went beyond FDI to include portfolio investment and was even broader than that adopted in *NAFTA* ch 11. See below Part III(B)(1).

⁵⁴ David Henderson, *The MAI Affair: A Story and Its Lessons* (1999) 42.

⁵⁵ OECD, *Ministerial Statement on the Multilateral Agreement on Investment* (1998) [1], [3].

⁵⁶ These member states were Australia, Canada, France, the United Kingdom and the US. See discussion below Part IV(E).

⁵⁷ See Catherine Lalumière and Jean-Pierre Landau, *Rapport sur l'Accord Multilatéral sur l'Investissement* (1998) ('Lalumière Report').

agreement. Less than two months later, the OECD announced that negotiations would cease with no final agreement to result.⁵⁸

B The MAI Provisions

Much of the criticisms levelled by NGOs on the Internet against the MAI focused on problematic similarities between the MAI provisions and Chapter 11 of *NAFTA*. To test the accuracy of these claims (and, by extension, the ability of NGOs to act as intellectual competitors of negotiating fora) it is first necessary to understand the scope and operation of the MAI provisions.

Various draft texts of the MAI were produced between 1997 and 1998.⁵⁹ This part of the analysis is based on the last version of the agreement that was produced on 24 April 1998 and released by the OECD on the Internet.⁶⁰

The draft contains 12 chapters and encompasses 145 pages. Despite its length, the majority of clauses in the draft text deal with recognised disciplines in investment liberalisation, investment protection and dispute settlement.⁶¹ The MAI negotiators referred to these disciplines as the ‘three key areas of foreign direct investment rule-making’.⁶² This is not surprising given that the mandate of the MAI exercise was to deliver an agreement with ‘high standards’ in those areas.⁶³ The MAI negotiators did go beyond these core issues to consider disciplines in what they termed ‘new matters’.⁶⁴ However, these new matters were, at least initially, further disciplines of interest to foreign investors, including: prohibitions or limits on performance requirements;⁶⁵ the ability to transfer freely both profit and capital out of the host state;⁶⁶ and rights of access and residence for key foreign personnel.⁶⁷

In the early part of negotiations, broader considerations of the impact of these disciplines on regulatory autonomy, or indeed questions of international regulatory constraints on investors, were not a central concern of the MAI negotiators.⁶⁸ This limited approach changed late in the negotiations in March

⁵⁸ OECD, ‘Informal Consultations on International Investment’ (Press Release, 3 December 1998).

⁵⁹ For an overview of the negotiating process leading to the last version of the agreement, see Dymond, above n 46, 28–33.

⁶⁰ OECD, *MAI Negotiating Text*, above n 46. See also OECD, *The Multilateral Agreement on Investment: Commentary to the Consolidated Text* (1998).

⁶¹ OECD, *MAI Negotiating Text*, above n 46, 13–70.

⁶² William Witherell, ‘Opening Address’ in OECD, *Multilateral Agreement on Investment State of Play in April 1997* (1997) 12, 13.

⁶³ OECD, *CIME/CMIT Report*, above n 26, ch 3.

⁶⁴ William Dymond, ‘State of Play of the MAI Negotiations’ in OECD, *Multilateral Agreement on Investment State of Play as of February 1997* (1997) 7, 8.

⁶⁵ OECD, *MAI Negotiating Text*, above n 46, 18.

⁶⁶ *Ibid* 59.

⁶⁷ *Ibid* 14.

⁶⁸ For example, the list of ‘special topics’ considered by the MAI Expert Group on Special Topics encompassed key personnel, performance requirements, investment incentives, monopolies and state enterprises, privatisation, and other topics. The question of standards of conduct for investors was regarded as a component of ‘other topics’. This category received perfunctory treatment, as evidenced by Anders Ahnlid, ‘Special Topics’ in OECD, *Multilateral Agreement on Investment State of Play as of February 1997* (1997) 27, 30.

1998. After sustained pressure from NGOs, and despite a largely exclusionary approach to the role of NGOs in the MAI negotiations, the Chairperson of the MAI Negotiating Group put forward a comprehensive package of proposals concerning environmental and labour provisions.⁶⁹ The Chairperson's package is notable as the MAI is arguably the first ever multilateral commercial agreement to amend directly its provisions to take into account NGO concerns.

Before examining the structure and substantive correctness of the NGO campaign, the next part of the article will examine the key components of the MAI on the scope of application, investment liberalisation, investment protection and dispute settlement. Within these core disciplines, the MAI provisions represented almost a facsimile (albeit strengthened in some respects) of the *NAFTA* Chapter 11 model.

1 *Scope of Application: Definition of Investment*

The scope of an investment agreement is largely delineated by the types of capital covered by the agreement. Like *NAFTA*, the MAI adopted an asset based definition of investment.⁷⁰ But the MAI went beyond the *NAFTA* approach in several important respects. In particular, the MAI definition is an open definition; it lists items that are 'included' and, thereby, implies that non-listed items are also covered. In contrast, article 1101 of *NAFTA* adopts a closed definition, which states what is included and excluded. The MAI approach may have been due to the confidence of the negotiators at the commencement of MAI negotiations. In 1995 the global economy had been marked by a continuous growth in investment flows since the mid 1980s. This stability and the desire to draft a 'high standards' agreement may have led MAI negotiators to try to cover as many forms of capital flow as possible.

⁶⁹ OECD, *Chairman's Note on Environment and Related Matters and on Labour* (1998).

⁷⁰ The MAI, ch 2, art 2 defines 'investment' as:

Every kind of asset owned or controlled, directly or indirectly, by an investor, including:

- (i) an enterprise (being a legal person or any other entity constituted or organised under the applicable law of the Contracting Party, whether or not for profit, and whether private or government owned or controlled and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation);
- (ii) shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom;
- (iii) bonds, debentures, loans and other forms of debt, and rights derived therefrom;
- (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
- (v) claims to money and claims to performance;
- (vi) intellectual property rights;
- (vii) rights conferred pursuant to law or contract such as concessions, licenses, authorisations, and permits;
- (viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

OECD, *MAI Negotiating Text*, above n 46, 11.

2 Investment Liberalisation

This broad approach is also evident in the investment liberalisation provisions. Like *NAFTA*, the MAI aimed to liberalise national restrictions imposed on investors by requiring member states not to discriminate between foreign and domestic investors.⁷¹ Again, like *NAFTA*, the MAI applied the non-discriminatory standards of national and MFN treatment to both the pre- and post-admission phases of the investment process.⁷² Depending on exceptions lodged by contracting parties, extending the obligation of non-discrimination to the pre-admission phase of the investment process would provide investors with the right of entry into the host state. In comparison, most bilateral investment treaties, with the exception of those concluded by the US and Canada, do not provide foreign investors with rights of entry.⁷³ In other words, they preserve the ability of host states to regulate the entry of foreign investors, an issue that is often grounded in sensitive political rather than economic reasons.⁷⁴

The incursion of the MAI model into these sovereignty-based grounds for excluding entry of foreign investors was also magnified by the way in which the agreement effected liberalisation commitments. Like *NAFTA*, the MAI adopted a top down model of liberalisation; the starting point was the rights set out in the agreement which ostensibly applied to all economic sectors and laws of the host state unless exempted in the agreement by the contracting party. Aside from general exceptions that applied to all or most of the MAI,⁷⁵ member states could also lodge country-specific exceptions to carve out particular discriminatory legislation from the operation of the MAI.⁷⁶ In contrast, the approach taken in the WTO *General Agreement on Trade in Services* is a bottom up approach,

⁷¹ OECD, *MAI Negotiating Text*, above n 46, 13.

⁷² *Ibid.* The references to 'establishment' and 'acquisition' in the national treatment and MFN treatment clauses indicate that these provisions were intended to extend to both pre- and post-admission of foreign investment.

⁷³ See, eg, *India-United Kingdom: Agreement for the Promotion and Protection of Investments*, opened for signature 14 March 1994, 34 ILM 935 (1995) (entered into force 6 January 1995). Unlike the MAI, there is no explicit reference to wording such as 'establishment' or 'acquisition'. Instead, under art 4(1) of this BIT, each party is required to 'accord to investments of investors of the other Contracting Party, including their operation, management, maintenance, use, enjoyment or disposal by such investors, treatment which shall not be less favourable than that accorded either to investments of its own investors or to investors of any third State.' See also UNCTAD, *Admission and Establishment*, UN Doc UNCTAD/ITE/IIT/10 (1 January 1999) 18; Dolzer and Stevens, above n 32, 49–66.

⁷⁴ For a comprehensive analysis of the exclusion of national defence and security sectors from the entry of FDI into the US, see Trebilcock and Howse, above n 36, 342–4; David Nance and Jessica Wassermann, 'Regulation of Imports and Foreign Investment in the United States on National Security Grounds' (1990) 11 *Michigan Journal of International Law* 926. In the context of developing countries and their resistance to extending national treatment to the pre-establishment phase of the investment process, see Tim Weiner, 'As National Oil Giant Struggles, Mexico Agonizes over Opening It to Foreign Ventures', *New York Times* (New York, US), 17 February 2002, 6; A V Ganesan, 'Developing Countries and a Possible Multilateral Framework on Investment: Strategic Options' (1998) 7(2) *Transnational Corporations* 1. See also Jürgen Kurtz, 'A General Investment Agreement in the WTO? Lessons from Chapter 11 of *NAFTA* and the OECD Multilateral Agreement on Investment' (Jean Monnet Working Paper No 6/02, New York University Law School, 2002) 11–13.

⁷⁵ These general (but relatively limited) exceptions enabled member states to impose restrictions on foreign investment on national security, public order, balance of payment, prudential and taxation grounds: OECD, *MAI Negotiating Text*, above n 46, 77–89.

⁷⁶ OECD, *MAI Negotiating Text*, above n 46, 90–5.

whereby contracting parties have the discretion to nominate and open specific sectors when they feel ready to do so.⁷⁷

The top down structure of the MAI was particularly problematic in terms of the rights of entry provided under the agreement. Given the often sensitive political grounds for restricting entry, the top down approach forces contracting parties to be overly cautious and lodge extensive exceptions to the proposed agreement. Indeed, in early 1997 the Chairperson of the MAI Negotiating Group proposed that member states table their proposed exceptions prior to completion of the Agreement. The purpose of this was to reach the highest level of liberalisation at the outset by negotiating away proposed country-specific exceptions. Negotiators took the view that:

these [country-specific] reservations will be the essential measuring rod against which can be judged the value of the rights and obligations of the MAI and, in large measure, *determine the readiness of countries to adhere to the MAI*.⁷⁸

However, the Chairperson's proposal led to a surprisingly high number of exceptions amongst supposedly liberal, like-minded states.⁷⁹

3 *Investment Protection*

Chapter IV of the MAI sets out the investment protection provisions of the draft MAI. Like *NAFTA*, the MAI contains strong provisions requiring host states to compensate investors in the event of expropriation of their investment.⁸⁰ These provisions cover direct as well as indirect expropriations, with the latter covering governmental measures 'having equivalent effect' to a direct expropriation.⁸¹ But the MAI provisions replicate the drafting flaw in article 1110 of *NAFTA*. There is no guidance within the MAI provisions as to whether normal regulatory changes that negatively affect the value of an investment would be covered within the concept of an indirect expropriation. Similarly, the investment protection provisions duplicated *NAFTA* article 1105 by requiring member states to provide 'fair and equitable treatment and full and constant protection and security' while ensuring a minimum standard of treatment of 'that required by international law'.⁸²

Within *NAFTA*, these broad and undefined obligations have led to an explosion of arbitral cases brought by investors challenging seemingly normal regulatory measures as breaching the Chapter 11 investment protection

⁷⁷ *Marrakesh Agreement Establishing the World Trade Organisation*, above n 17, annex 1B (*General Agreement on Trade in Services*) 1869 UNTS 183, arts 16–17.

⁷⁸ William Dymond, 'The Main Substantive Provisions of the MAI' in OECD, *Proceedings of the Special Session of the Multilateral Agreement on Investment Held in Paris on 17 September 1997* (1997) 13, 16 (emphasis added).

⁷⁹ See UNCTAD, *Lessons from the MAI*, above n 38, 12; See also Commonwealth of Australia, *Australia: Revised Schedule of Preliminary Reservations* (1997). Australia's reservations to the MAI essentially preserved most of its current system of regulating and screening the entry of foreign investors under the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (and accompanying Ministerial statements).

⁸⁰ OECD, *MAI Negotiating Text*, above n 46, 57–8.

⁸¹ *Ibid* 57.

⁸² *Ibid* 57.

guarantees.⁸³ Indeed, the *NAFTA* Free Trade Commission recently issued an interpretation on these provisions in an attempt to limit the influx of arbitral cases.⁸⁴ But the MAI negotiators simply assumed that this broad formulation would be accepted, noting that

the draft [of the provisions on expropriation] has many similarities with well-known investment protection provisions found in hundreds of bilateral investment protection agreements. This is no surprise because it was never the intention of the negotiating partners to ‘re-invent the wheel’, but rather to add some more spokes in order to strengthen the whole vehicle.⁸⁵

This unwillingness to assess critically the broad *NAFTA* approach to investment protection is symptomatic of the approach of the negotiators, at least initially, to the MAI exercise generally.

4 Dispute Settlement

Like *NAFTA*, the MAI contains both state-to-state and investor-to-state dispute settlement procedures.⁸⁶ Again, there appears to have been little analysis by the MAI negotiators of the difficulties that had been encountered under Chapter 11 of *NAFTA* in the use by investors of these procedures to challenge regulatory measures as contrary to the *NAFTA* investment protection provisions. This is not altogether surprising as, with the exception of the settled action

⁸³ There is no central repository of documents submitted in *NAFTA* ch 11 cases. For ch 11 cases involving Canada, the website of the Canadian Department of Foreign Affairs and International Trade maintains a comprehensive list of documents submitted in relation to such cases: Canadian Department of Foreign Affairs and International Trade, *Trade Negotiations and Agreements: Dispute Settlement* (2001) <<http://www.dfait-maeci.gc.ca>> at 23 September 2002. For ch 11 cases involving other *NAFTA* states, the best sources of documents are two websites maintained by attorneys that are active in this area: Appleton & Associates International Lawyers, *NAFTA Cases* (2000) <<http://www.appletonlaw.com>> at 23 September 2002; and Todd Weiler, *NAFTALaw.org* (2000) <<http://www.toddweiler.com>> at 23 September 2002. However, these sites are not complete and some documents involved in *NAFTA* cases can be difficult to locate. For cases that have adopted inconsistent (and broad) interpretations of the *NAFTA* investment protection provisions, see *Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/1 (30 August 2000), 40 ILM 36 (2001); *NAFTA* ch 11 Arbitration, *SD Myers Inc v Government of Canada* (13 November 2000) 40 ILM 1408 (2001); *NAFTA* ch 11 Arbitration, *Pope & Talbot Inc v Government of Canada (Award on the Merits of Phase 2)* (10 April 2001) <<http://www.dfait-maeci.gc.ca>> at 23 September 2002. For secondary sources on the problems that have arisen from the *NAFTA* ch 11 cases, see J Martin Wagner, ‘International Investment, Expropriation and Environmental Protection’ (1999) 29 *Golden Gate University Law Review* 465; David Gantz, ‘Potential Conflicts between Investor Rights and Environmental Regulation under *NAFTA*’s Chapter 11’ (2001) 33 *George Washington International Law Review* 651; Chris Tollefson, ‘Games without Frontiers: Investor Claims and Citizen Submissions under the *NAFTA* Regime’ (2002) 27 *Yale Journal of International Law* 141; Ari Afilalo, ‘Constitutionalization through the Back Door: A European Perspective on *NAFTA*’s Investment Chapter’ (2002) 34 *New York University Journal of International Law and Politics* 1.

⁸⁴ On 31 July 2001 the *NAFTA* states, through the auspices of the *NAFTA* Free Trade Commission, agreed to clarify the operation of some of the ch 11 provisions, particularly art 1105. See ‘US, Canada, Mexico Agree to Clarify *NAFTA*’s Investor-State Provisions’ (2001) 19(31) *Inside US Trade* 1, 21–3.

⁸⁵ Joachim Karl, ‘Investment Protection’ in OECD, *Multilateral Agreement on Investment State of Play as of February 1997* (1997) 14, 14.

⁸⁶ OECD, *MAI Negotiating Text*, above n 46, 63–76.

brought by Ethyl Corporation against Canada,⁸⁷ most of the *NAFTA* Chapter 11 cases postdate the end of MAI negotiations. But it is notable that some of the OECD countries objected to the extension of the investor-state dispute resolution procedure to the pre-establishment phase of the investment process. There was some concern about giving potential investors standing to file a claim against a host state in which they were planning to invest.⁸⁸

The next part of the article will turn to the NGO campaign against the MAI. It will examine that campaign in three parts. First, the article will consider the way in which NGOs used the Internet to organise their campaign against the MAI. Secondly, the article will assess the substantive correctness of NGO claims about the MAI posted on the Internet. Thirdly, the article will consider the OECD response and outcomes of the NGO campaign.

IV THE NGO 'STOP MAI' CAMPAIGN

A *Overview and Typology*

The onset of the NGO campaign against the MAI can be traced to February 1997 when a draft of the MAI was leaked to Public Citizen, a US NGO founded by consumer advocate Ralph Nader.⁸⁹ Public Citizen immediately published the draft negotiating text on the Internet.⁹⁰ Up to that point, MAI negotiations had largely been conducted in secrecy between representatives of the OECD's 29 member states. After the release of the text on the Internet, what had previously been a confidential working document became 'available to anyone with a computer and a modem.'⁹¹

The release of the negotiating text on the Internet led to an explosion of concern amongst a bewildering range of NGOs. An estimated 600 NGOs in nearly 70 countries were involved in the MAI campaign.⁹² Environmental groups were particularly prominent in opposing the draft treaty. Friends of the Earth, an international environmental NGO with offices in 63 countries, opposed the MAI on the basis of its perceived impact on environmental laws.⁹³ These efforts were mirrored by many domestic environmental NGOs located in the OECD states, such as the Australian Conservation Foundation.⁹⁴ While environmental groups were particularly prominent, the campaign attracted a wide variety of other

⁸⁷ The award on jurisdiction in the action brought by Ethyl Corporation against Canada was issued on 24 June 1998 (whilst negotiations towards the MAI were still ongoing): *NAFTA* ch 11 Arbitration, *Ethyl Corporation v Government of Canada (Award on Jurisdiction)* (24 June 1998) 38 ILM 708 (1999) ('*Ethyl Corporation*'). The impact of *Ethyl Corporation* on the NGO campaign against the MAI is considered further below in Part IV(C)(2).

⁸⁸ See UNCTAD, *Lessons from the MAI*, above n 38, 19.

⁸⁹ Stephen Kobrin, 'The MAI and the Clash of Globalizations' (1998) 112 *Foreign Policy* 97, 98.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.* 97.

⁹³ Friends of the Earth, *License to Loot: The MAI and How to Stop It* <<http://www.foe.org/international/loot.html#harm>> at 23 September 2002.

⁹⁴ Anna Reynolds, 'Australian Conservation Foundation' in James Goodman and Patricia Ranald (eds), *Stopping the Juggernaut: Public Interest Versus the Multilateral Agreement on Investment* (2000) 196.

groups. An indicative typology would include domestic trade unions (eg the United Steelworkers of America), international human rights groups (eg Amnesty International), developmental bodies (eg Community Aid Abroad),⁹⁵ religious organisations (eg the Quakers),⁹⁶ churches (eg Uniting Church in Australia)⁹⁷ and nationalist political parties (eg the Australian One Nation party).⁹⁸

Most of these groups can be regarded as specific interest organisations. Yet the 'Stop MAI' campaign also involved groups opposing the broader processes of economic globalisation. In the US, Public Citizen (which claims membership of more than 150 000) used its Global Trade Watch division to oppose the MAI.⁹⁹ The broader mandate of Public Citizen is evident in its vow to

work in defense of consumer health and safety, the environment, good jobs and democratic decision-making, which are being threatened by corporate-led globalization that includes so-called 'free trade' agreements such as the WTO and *NAFTA*.¹⁰⁰

A similar group which campaigned strongly against the MAI is the Council of Canadians, a 'citizens' watchdog' that claims membership of over 100 000 spread across 60 chapters in Canada.¹⁰¹

The diversity and large numbers of NGOs involved in the campaign as well as the depth of their concern can be traced to three factors. First, the text released onto the Internet did not contain the list of confidential country-specific exceptions lodged by member states. Without these exceptions, the text implied that all sectors of a nation's economy would be open to unrestricted foreign investment. This was obviously not the case. As noted earlier, the exceptions lodged by member states such as Australia proved to be much more extensive than was expected. This mistaken perception was never forcefully countered by the OECD. As will be shown later, when the OECD eventually created its own MAI website in April 1998, it released the negotiating text with official commentary but little clear explanation of the top down structure of the agreement.

Secondly, the MAI negotiating text contained similar investor protection and dispute settlement provisions to those in Chapter 11 of *NAFTA*. In turn, the

⁹⁵ Community Aid Abroad, 'Community Aid Abroad' in James Goodman and Patricia Ranald (eds), *Stopping the Juggernaut: Public Interest Versus the Multilateral Agreement on Investment* (2000) 169.

⁹⁶ Quaker United Nations Office, *The Multilateral Agreement on Investment: A Preliminary Assessment* <<http://www.quaker.org/quino/maiasses.html>> at 23 September 2002.

⁹⁷ Ann Wansborough, 'Uniting Church in Australia' in James Goodman and Patricia Ranald (eds), *Stopping the Juggernaut: Public Interest Versus the Multilateral Agreement on Investment* (2000) 185.

⁹⁸ See generally One Nation, *The MAI* (1998) <<http://www.gwb.com.au/onenation/press/210198.html>> at 23 September 2002; One Nation, *MAI Wounded But Not Dead* (1998) <<http://www.gwb.com.au/onenation/press/010598.html>> at 23 September 2002; One Nation, *One Nation Welcomes Collapse of Big Business Treaty* (1998) <<http://www.gwb.com.au/onenation/press/071198.html>> at 23 September 2002.

⁹⁹ See generally Public Citizen, *Global Trade Watch: About Trade Watch* <<http://www.citizen.org/trade/about/>> at 23 September 2002.

¹⁰⁰ Public Citizen, *About Public Citizen* <<http://www.citizen.org/about/>> at 23 September 2002.

¹⁰¹ The Council of Canadians, *About Us* <<http://www.canadians.org/about/about-main.html>> at 23 September 2002.

NAFTA provisions had been used by Ethyl Corporation in its (at that time) ongoing *NAFTA* action against Canada to challenge a ban on the import and transport of a petroleum additive.¹⁰² The purpose of the ban was ostensibly environmental. In July 1998 (in the midst of the MAI negotiations), Canada agreed to settle the dispute, lift its ban and pay Ethyl Corporation US\$13 million in compensation.¹⁰³ This led to the assumption by NGOs that the MAI provisions, if finalised, could be similarly used by foreign investors to challenge environmental or other regulatory measures that had the effect of lessening the value of actual or proposed investments.¹⁰⁴

Finally, NGOs used the Internet extensively in their campaign, both to coordinate their opposition and to disseminate information about the MAI. The effectiveness of the role of the Internet in the coordination of the 'Stop MAI' campaign will be considered next.

B *Structure of the Campaign: NGOs as 'Network Guerillas'?*

The draft MAI negotiating text was first leaked onto the Internet in February 1997.¹⁰⁵ By March 1997 it became clear that MAI negotiators would not be able to meet the original deadline of May 1997. At the OECD Ministerial Meeting in May 1997, a new deadline to finish negotiations by May 1998 was agreed upon. Crucially, this decision provided NGOs opposed to the MAI time in which to organise their campaign against the agreement.

The Internet was the primary way in which NGOs organised the 'Stop MAI' campaign. As they were largely excluded from official communication channels with the OECD, NGOs began to disseminate information about the MAI amongst themselves. The leaked draft of the MAI was quickly picked up by most of the NGO websites opposing the MAI. Similarly, NGO critiques of the MAI were distributed through the 'Stop MAI' network. The use of the Internet to share information about the MAI is exemplified by a boast of a prominent anti-MAI campaigner:

'We are in constant contact with our allies in other countries', said Maude Barlow, the Council of Canadians' chairwoman. 'If a negotiator says something to someone over a glass of wine, we'll have it on the Internet within an hour, all over the world.'¹⁰⁶

The tools of the Internet — websites and email newsgroups — thus became the mechanism to link up a vast array of NGOs. There were an estimated 50 websites devoted to the MAI and 200 newsgroup postings.¹⁰⁷ An example of the

¹⁰² *NAFTA* ch 11 Arbitration, *Ethyl Corporation (Award on Jurisdiction)* (24 June 1998) 38 ILM 708 (1999).

¹⁰³ *NAFTA* ch 11 Arbitration, *Ethyl Corporation (Decision Regarding the Place of Arbitration)* (24 June 1998) 38 ILM 700, 701 (1999).

¹⁰⁴ Maude Barlow and Tony Clarke, *MAI: The Multilateral Agreement on Investment and the Threat to American Freedom* (1998) 61.

¹⁰⁵ For further analyses of the role of the Internet in the NGO campaign against the MAI, see Guy de Jonquières, 'Network Guerillas', *Financial Times* (London, UK), 30 April 1998, 12; Madelaine Drohan, 'How the Net Killed the MAI: Grassroots Groups Used Their Own Globalization to Derail Deal', *The Globe and Mail* (Toronto, Canada), 29 April 1998, 1.

¹⁰⁶ Drohan, above n 105.

¹⁰⁷ Kobrin, above n 89, 97.

way in which newsgroups coordinated the campaign is the Australian 'How to stop MAI' newsgroup.¹⁰⁸ That newsgroup contains details of protests against the MAI in various Australian states and territories, the preparation of media statements, the coverage of the MAI in the mainstream media, the results of a teleconference with NGOs in other countries, and even an outing of 'some of Australia's pro-MAIers'.¹⁰⁹

While it is clear that NGOs relied heavily on the Internet to structure their campaign against the MAI, the next logical step in the analysis should focus on how that technology affected the substantive accuracy of NGO claims about the MAI. The next part of the article will consider the substance of NGO claims against the MAI publicised on the Internet and compare those claims objectively to the analysis of the MAI provisions considered earlier. NGO opposition can be basically divided into two distinct themes. First, NGOs opposed the MAI as an instrument of economic globalisation. Under this rubric, many NGO claims stretched the ambit of MAI clauses to breaking point. But whilst largely inaccurate, these incendiary claims were never forcefully countered by the OECD, nor by the release of basic information about the MAI project. The second theme had much more substance and relied on the problematic similarities between the MAI provisions and *NAFTA* Chapter 11. With regard to this second theme, it is submitted that NGOs did indeed act as some form of 'intellectual competitors' with the OECD. The best evidence of this is the fact that the Chairperson of the MAI Negotiating Group released a package of changes late in negotiations to address these concerns.¹¹⁰

C *Substance of the Campaign: NGOs as Intellectual Competitors?*

1 *The MAI as an Instrument of Economic Globalisation*

Much NGO opposition was not directed at the MAI specifically but reflected a more general anxiety about the effects of economic globalisation.¹¹¹ This anxiety appears to be based on underlying opposition to the pursuit of policies of economic liberalism.

As a starting point, some NGOs questioned the underlying rationale of the MAI by claiming that, unlike domestic participants, foreign investors do not assist the economies and communities of host states.¹¹² For most of the MAI

¹⁰⁸ James Goodman, *Stop MAI and How Tos* (1998) <http://www.interlog.com/~3mowchuck/news/mai_ann02.html> at 23 September 2002.

¹⁰⁹ *Ibid.*

¹¹⁰ OECD, *Chairman's Note*, above n 69.

¹¹¹ Since the close of negotiations in 1998, a number of NGOs who opposed the MAI have published books describing the organisation and basis for their campaign against the MAI. For a description of the US and Canadian NGO campaign, see Barlow and Clarke, above n 104. In addition, the Australian campaign is well documented in Goodman and Ranald (eds), above n 94.

¹¹² For example:

negotiations, the OECD never really countered this basic concern by illustrating the benefits that flow from foreign investment (and, by extension, the MAI, which would have liberalised restrictions on the entry and operation of FDI).

NGOs went even further to argue that the MAI was not only economically problematic but that it would provide investors with a degree of power that would impact adversely on the democratic processes of host states:

this global investment treaty constitutes a power grab for transnational corporations that would end up hijacking the fundamental democratic rights and freedoms of peoples all over the world.¹¹³

Clearly, this type of claim overstates the significance of the MAI. The primary aim of the MAI was to extend the non-discriminatory standards of treatment long established in bilateral investment treaties on a multilateral basis (albeit to the pre-establishment phase of the investment process). But again, this type of incendiary claim was never countered by a calm, clear and accessible illustration by the OECD of the MAI, its provisions and expected benefits.

More specifically, the MFN and national treatment clauses in the MAI were often misunderstood by prominent and influential NGOs. In 1998, Maude Barlow and Tony Clarke published a book attacking the MAI.¹¹⁴ At that time, Barlow was chairperson of the Council of Canadians, which took a prominent role in opposing the MAI.¹¹⁵ The publication makes the following claim about the operation of the MFN clause in the MAI:

Under the ‘most favoured nation’ clause, corporations based in the signatory countries (the twenty-nine OECD countries) are to be given *preferential treatment* with regard to their investments.¹¹⁶

This claim is simply incorrect. The MFN obligation would require signatory countries to provide the same standard of treatment between investors of different, foreign countries. Of itself, the MFN clause would not provide any form of preferential treatment for foreign investors.

A distinction needs to be made between foreign and domestic investors based on the formation of capital. Implicitly, domestic investors participate in a social contract by staying in production, hiring local workers, paying taxes and retaining profits in the country. In doing so, they contribute to, as well as benefit from, the socialized value of capital. *But foreign investors which suddenly appear on the scene have made no contribution to the build-up of social wealth in the host country.* In many cases, foreign firms buying an existing domestic company intend to stay only a short time, yet want to be able to take full advantage of the stored social value of capital built-up by previous generations of labour.

The Council of Canadians, *Towards a Citizens’ MAI: An Alternative Approach to Developing a Global Investment Treaty Based on Citizens’ Rights and Democratic Control* (1998) <<http://www.germanwatch.org/tw/citizmai.htm>> at 23 September 2002 (emphasis added).

¹¹³ Ibid.

¹¹⁴ Barlow and Clarke, above n 104.

¹¹⁵ An example of the Council’s activities in opposing the MAI is that in 1998 it undertook a ‘citizen’s inquiry’ of the MAI which comprised hearings in eight major cities across Canada. The report on the findings of those hearings is set out in Council of Canadians, *Confronting Globalization and Reclaiming Democracy* <<http://www.canadians.org/documents/campaigns-mai-confronting.pdf>> at 23 September 2002.

¹¹⁶ Barlow and Clarke, above n 104, 16 (emphasis added).

To some extent, the inaccuracies of NGO claims were shaped by the manner in which the negotiating text was leaked onto the Internet. It was released without details of the country-specific exceptions that could be lodged by contracting parties. This led to the mistaken perception that all national laws of contracting parties that discriminated against foreign investors would be eliminated by the MAI. In turn, NGOs presented their claims regarding the impact of the MAI on national sovereignty in particularly accessible and threatening ways. For example, the Western Governors' Association, an American advocacy NGO, prepared a report easily accessible on its Internet website detailing state-by-state specific laws that might be threatened if the US signed the MAI.¹¹⁷ The same approach was taken by Friends of the Earth, which cited a variety of pro-environmental laws that it claimed would conflict with the MAI.¹¹⁸

2 *The MAI as a Facsimile of NAFTA Chapter 11*

Aside from their broad concerns about economic globalisation, NGOs also used a more specific argument against the MAI: its facsimile of the *NAFTA* Chapter 11 model and likely impact on the regulatory autonomy of host states. NGOs focused particularly on the close similarity between the investment protection provisions of the *NAFTA* and the MAI. The settlement of the arbitral dispute brought by Ethyl Corporation against Canada under *NAFTA* Chapter 11 gave impetus to these claims.¹¹⁹ The concern that the MAI (by replicating *NAFTA* article 1110-type protection against indirect expropriation) would inhibit normal regulatory measures underlined much of the specific NGO opposition to the MAI:

Perhaps the greatest environmental threat the MAI poses is that, under the investor-state dispute procedure, *any new laws to protect the environment, wilderness, species or natural resource production* could be considered a form of 'expropriation' and foreign investors would have the right to sue for compensation before an international tribunal made up of unelected trade bureaucrats.¹²⁰

NGO analyses of this point seem somewhat prophetic given the results and jurisprudence that have resulted from *NAFTA* Chapter 11 cases since *Ethyl*

¹¹⁷ Western Governors' Association, *Multilateral Agreement on Investment: Potential Effects on State and Local Government* (1997) <<http://www.westgov.org/wga/publicat/maiweb.htm>> at 23 September 2002.

¹¹⁸ Friends of the Earth, *Examples of Laws That Would Conflict with the MAI* <<http://www.foe.org/international/trade/mai/shortlaws.html>> at 23 September 2002.

¹¹⁹ Ethyl Corporation's case against Canada under *NAFTA* ch 11 was settled in July 1998, at the height of the NGO campaign against the MAI: *NAFTA* ch 11 Arbitration, *Ethyl Corporation (Decision Regarding the Place of Arbitration)* (24 June 1998) 38 ILM 700, 701 (1999).

¹²⁰ Barlow and Clarke, above n 104, 60 (emphasis added).

Corporation.¹²¹ The *NAFTA* states have scrambled to try and find a solution to the large number of arbitral cases brought by investors under Chapter 11. Until prompted by the NGO campaign (and resulting public opposition), the MAI negotiators did little to consider these legitimate concerns about the broad and undefined coverage of the investment protection provisions. The NGO campaign on this substantive aspect reaped dividends late in the negotiations. On 9 March 1998 the Chairperson of the MAI Negotiating Group proposed changes to the draft MAI 'to achieve balance between MAI disciplines and other important areas of public policy of concern to MAI Parties and to avoid unintended consequences on normal regulatory practices'.¹²²

Despite the insightful analyses by NGOs on these issues, the OECD provided them with little opportunity to meet with negotiators and communicate their views. Indeed, the OECD management of the negotiating process was traditionally statist, characterised by low levels of transparency (or, in the alternative, high levels of secrecy) and limited opportunities for most NGOs to participate. This exclusionary approach seems to have assisted NGOs in raising public opposition to the MAI.

D *The OECD Response: Too Little Too Late*

1 *Transparency*

The MAI negotiations were largely conducted in secret with few official documents being released to the public. However, when the OECD realised that the only available information about the MAI on the Internet was provided by hostile NGO sites, it was forced in 1998 to establish an official MAI website.¹²³ This was a significant response to the NGO campaign, especially as the most recent official draft of the negotiating text was placed on the MAI website. The website also included a variety of other materials, including the mandate for

¹²¹ See above n 83. See also *Methanex Corporation v United States of America (First Partial Award)* (7 August 2002) <<http://www.state.gov/documents/organization/12613.pdf>> at 23 September 2002. This very recent arbitral decision ruled on the jurisdictional issues surrounding Methanex's challenge under *NAFTA* ch 11 against Californian regulations banning the use of Methyl Tertiary Butyl Ether ('MTBE') (a gasoline additive) on ostensibly environmental and health reasons. Methanex is a producer of methanol, a principal ingredient of MTBE. Methanex challenged the Californian ban as breaching *NAFTA* arts 1102 (national treatment), 1105 (fair and equitable treatment) and 1110 (expropriation). The tribunal ruled that some of Methanex's arguments might fall within the jurisdictional requirements of art 1101(1) of *NAFTA* and invited Methanex to submit a fresh pleading. Methanex's claim is possibly one of the broadest *NAFTA* ch 11 challenges. Amongst other things, it claims an expropriation of its investment in the US despite the fact that the Californian banning order has not as yet been implemented.

¹²² OECD, *Chairman's Note*, above n 69, 2.

¹²³ OECD, *Multilateral Agreement on Investment: Documentation from the Negotiations*, above n 26.

negotiations, a UK report on the developmental implications of the MAI and various Ministerial statements about the MAI.¹²⁴

These core documents were important but generally require specialist knowledge of economics, investment flows and past treaty initiatives in order to appreciate fully their provisions and conclusions. There was no clear and unbiased explanation of the manner in which the non-discriminatory standards of MFN and national treatment would operate. Similarly, there was little emphasis in these official documents on the ability of member states to lodge country-specific exceptions and exclude core components of domestic regulatory autonomy from the operation of the MAI. Thus these official documents were never a match for many of the colourful and apocalyptic NGO claims about corporate power and the erosion of democratic norms in host states.

The content of the official MAI website is symptomatic of the assumption by the OECD negotiators that the public automatically understands or accepts the benefits that result from a process of trade and investment liberalisation. For most of the negotiations, little attempt was made to counter the incendiary anti-globalisation claims made by NGOs against the MAI. This was a critical mistake. An open international economy entails both costs and benefits. Both need to be carefully and honestly illustrated in order to develop public support for a treaty such as the MAI. From the commencement of negotiations in 1995 right up to early 1998, the OECD did not even attempt to undertake such an exercise. It was only in April 1998, towards the end of negotiations, that the OECD released a study entitled *Open Markets Matter: The Benefits of Trade and Investment Liberalisation*.¹²⁵ This report, which is primarily a statistical illustration of the benefits of economic globalisation, was immediately denounced by one of the Council of Canadians as 'pathetic'.¹²⁶ But it is precisely this type of study that needs to be undertaken and distributed before the start of negotiations towards an agreement like the MAI. Despite the report's statistical emphasis, it is written in an accessible style that addresses many NGO concerns about the process of economic globalisation. For example, chapter 7 of the report sets out the rationale for international investment rules and analyses their impact on national sovereignty.¹²⁷ Unfortunately, this 1998 report was released far too late; it should have been distributed and available electronically before negotiations had even commenced in 1995. This type of report, coupled with a clear explanation of the operation of the MAI, would have provided an alternative voice to (and possibly pre-empted) the NGO scare tactics in portraying the MAI as a lightning rod for grievances about the process of economic globalisation.

¹²⁴ Ibid. However, the website created in 1998 was a limited resource. It was only in February 2002 that the OECD released most of the documents relating to the MAI negotiations as a response 'to the interest of stakeholders and civil society ... to help interested parties gain a full understanding of the history and substance of these negotiations': OECD, 'OECD Publishes Documents Relating to 1995–1998 MAI Negotiations' (Press Release, 19 February 2002).

¹²⁵ OECD, *Open Markets Matter: The Benefits of Trade and Investment Liberalisation* (1999).

¹²⁶ Drohan, above n 105.

¹²⁷ OECD, *Open Markets Matter*, above n 125, ch 7.

2 *Participation*

Historically, the OECD has provided few opportunities for NGOs to become involved in its work. The MAI negotiations followed this precedent and were characterised by limited opportunities for NGO participation.

(a) *Background*

The *Convention on the Organisation for Economic Cooperation and Development*¹²⁸ gives the OECD discretion to establish participatory relations with NGOs to

- (a) address communications to non-member States or organisations;
- (b) establish and maintain relations with non-member States or organisations; and
- (c) invite non-member Governments or organisations to participate in activities of the Organisation.¹²⁹

Despite this broad discretion, the OECD has historically provided participatory opportunities only to certain types of NGOs.¹³⁰ In order to be consulted by the OECD, an international NGO must satisfy the OECD that it has the following attributes:

- (a) ... wide responsibilities in general economic matters or in a specific economic sector.
- (b) ... affiliated bodies belonging to all or most of the Member countries in the organisation.
- (c) ... substantially represents the non-Governmental interests in the field or sector in question.¹³¹

International NGOs that meet these strict requirements have the right to discuss subjects of common interest with a Liaison Committee chaired by the Secretary-General and to be consulted on particular OECD activities by relevant OECD officials or committees.¹³² These NGOs are also given access to certain documents to which the public does not have access.¹³³ These rights do not, however, extend to the right to attend negotiation sessions.

To date, the number of NGOs that have been granted consultative status with the OECD is very limited. This reflects the essentially state-centric view of the OECD. As the OECD sees itself as an intergovernmental body, its internal workings are viewed as being intentionally reserved for its member states.¹³⁴ The

¹²⁸ Opened for signature 14 December 1960, 888 UNTS 179 (entered into force 30 September 1961) ('*OECD Convention*').

¹²⁹ *Ibid* art 12.

¹³⁰ OECD (Liaison Committee with International Non-Governmental Organisations), *Decision of the Council on Relations with International Non-Governmental Organisations*, OECD Doc C(62)45 (1962).

¹³¹ *Ibid* [2].

¹³² *Ibid* [4]–[8].

¹³³ OECD documents are restricted unless the OECD decides to derestrict them. See OECD, *Council Resolution on the Classification and Declassification of Information* (1997). The right of NGOs who have been granted consultative status to access OECD documents is referred to in a letter from David Small to David Wirth, 21 September 1993, reproduced in Housman, above n 15, 717.

¹³⁴ For an example of this viewpoint, see Henderson, above n 54, 67–71.

main NGOs that have historically been granted consultative status with the OECD are the Business Industry Advisory Council ('BIAC') and the Trade Union Advisory Council ('TUAC'), representing the interests of business and trade unions respectively. Even these so-called 'social partners' of the OECD were provided with only limited participatory opportunities during the MAI negotiations.

(b) *The OECD's 'Social Partners' and the MAI: BIAC and TUAC*

BIAC was formed in 1962 soon after the establishment of the OECD. Its members comprise umbrella business organisations within the member states of the OECD.¹³⁵ The US Council for International Business is one of the most influential members of BIAC as it is staffed by former US Treasury and US Trade Representative officials.¹³⁶ Like the OECD, BIAC is based in Paris. The chairs of BIAC and of its various policy committees are normally executives of some of the largest corporate entities based in the OECD member states.¹³⁷

BIAC had long advocated a wider investment instrument within the OECD. In 1992 it expressed the view that such an agreement would constitute the OECD's single most effective contribution to improving global economic performance.¹³⁸ At the commencement of negotiations, BIAC assembled an 'experts group' of corporate legal staff.¹³⁹ Surprisingly, BIAC was provided with relatively limited access to negotiators and information about the negotiations. The normal process of consulting BIAC (and TUAC) was displaced by special arrangements for negotiating the MAI.¹⁴⁰ Even the draft text of the MAI had to be obtained through a member state in 1997 because the Negotiating Group refused BIAC access.¹⁴¹

In contrast, TUAC was originally constituted in 1948 as the trade union advisory committee for the Marshall Plan.¹⁴² Upon the creation of the OECD in 1962, TUAC continued to represent the views of trade unions to the new organisation. Much of TUAC's work has focused on building an acceptance of core labour standards within the OECD grouping. For example, it has advocated research and sponsored a conference designed to show that adherence to labour

¹³⁵ BIAC, *An Annual Report for 1999* (2000) 1.

¹³⁶ Elizabeth Smythe, 'State Authority and Investment Security: Non-State Actors and the Negotiation of the Multilateral Agreement on Investment at the OECD' in Richard Higgott, Geoffrey Underhill and Andreas Bieler (eds), *Non-State Actors and Authority in the Global System* (2000) 74, 82.

¹³⁷ *Ibid.*

¹³⁸ BIAC, *The OECD Multilateral Investment Agreement: BIAC Views on Specific Elements of an Eventual Instrument* (1995) 1.

¹³⁹ This is evidenced by interviews conducted with BIAC representatives: Smythe, above n 136, 82.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² The forerunner of the OECD was the Organisation for European Economic Cooperation ('OEEC'). The OEEC had been formed in 1947 to administer American and Canadian aid to reconstruct postwar Western Europe under the Marshall Plan. Membership of the OEEC comprised the West European states with the US and Canada as associated members. This heavy emphasis on the industrialised European member states of the OEEC has continued with the OECD. See generally Clive Archer, *Organizing Western Europe* (1990) 19.

standards does not deter the entry of investors into a host state.¹⁴³ At the commencement of MAI negotiations, it was clear that TUAC would be faced with a significant obstacle in that the mandate for negotiations was essentially a business agenda. There was, for example, no reference to labour standards or other regulatory issues within the mandate for negotiations or the accompanying *CIME/CMIT Report*. But by 1997 TUAC was not the only non-business NGO campaigning against the MAI. Following the leaking of the draft treaty in February 1997, the broad network of environmental, labour and social justice NGOs began to coordinate and disseminate information about the MAI. However, these broader NGOs were provided with even fewer participatory opportunities than BIAC and TUAC.

(c) *Exclusion of 'Other' NGOs*

For most of the negotiations, the broader set of NGOs had no real access to the MAI Negotiating Group. In December 1996 there was an informal meeting with some NGOs at the OECD. This was followed by a more comprehensive meeting on 27 October 1997, where members of the OECD Secretariat and Negotiating Group met with representatives of 27 NGOs. Prior to this meeting, the NGOs gathered for a strategy session to share information and establish networks.¹⁴⁴ Their demands included a suspension of negotiations until an assessment could be made of the social, environmental and developmental effects of the MAI.¹⁴⁵ This was an extremist position, particularly given the fact that the OECD had spent a full two years in negotiations towards the MAI. Not surprisingly, the OECD refused the demand for suspension of negotiations. This led to a walkout by the NGOs from the consultative session.¹⁴⁶ The NGOs apparently felt that it had not been a productive session as their objections had not been heeded. Their resulting frustration is expressed in the demand that the OECD stop 'talking publicly about its consultations with NGOs without also talking about the serious concerns raised in those consultations'.¹⁴⁷

This failed meeting represents a lost opportunity for NGOs. They had been given the opportunity (albeit relatively late in the negotiations) to offer constructive input into the MAI. Instead of engaging constructively with the OECD, the NGOs elected to walk away from this opportunity and focus their efforts on cultivating public opposition to the MAI.

The next section will examine two distinct outcomes of the NGO campaign. First, the campaign clearly influenced growing public opposition to the MAI throughout much of 1997 and 1998. Conversely, the NGO critique of the problematic similarities between the MAI and the *NAFTA* model also contributed to a constructive proposal by the Chairperson of the MAI Negotiating Group for changes to the MAI negotiating text.

¹⁴³ TUAC, *Labour Standards in the Global Trade and Investment System* (1996).

¹⁴⁴ Smythe, above n 136, 85.

¹⁴⁵ NGO/OECD Consultation on the MAI, 'Joint NGO Statement on the Multilateral Agreement on Investment' (27 October 1997) <<http://www.protglob.hss.uts.edu.au/archive/issue1/lib7mai.htm>> at 23 September 2002.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

E *Obstructive and Constructive Outcomes of the NGO Campaign*

The extension of the deadline to finish MAI negotiations in 1997 also coincided with changes in government in Britain and France. The new Blair and Jospin governments of Britain and France, respectively, showed a greater willingness to heed the concerns of NGOs.¹⁴⁸ Towards the end of the MAI negotiations, a number of parliamentary and other reviews had been implemented by member states of the OECD in recognition of the growing NGO and public opposition to the MAI. The five prominent member states that instituted some form of governmental review of the MAI were Australia, Canada, France, Great Britain and the US.

The Australian NGO campaign commenced in December 1997 after an ABC radio documentary on the MAI.¹⁴⁹ A national 'Stop MAI' group, comprising separate state-based committees, was formed soon after.¹⁵⁰ The group did not operate from formal premises. Instead, it communicated and organised itself almost entirely through email. A central aim of the Australian campaign was to raise awareness amongst the Australian public of the MAI and its provisions. In late 1998 a petition was sent to the OECD. The petition was used as the basis for a newspaper advertisement coinciding with the October 1998 OECD Ministerial Meeting.¹⁵¹ The major objective of the 'Stop MAI' group was to have the MAI reviewed by the Joint Standing Committee on Treaties ('JSCT') of the Commonwealth Parliament. That objective was realised in March 1998 when both the Minister for Foreign Affairs and the Senate referred the MAI to the JSCT.¹⁵² This was the first time that the JSCT had investigated a draft treaty. The JSCT inquiry into the MAI was a significant undertaking; it comprised five public hearings and entertained over 900 submissions.¹⁵³ Many of these submissions were prepared by peak advocacy NGOs.¹⁵⁴ Eighty six per cent of these submissions rejected the proposition that Australia should ratify the draft

¹⁴⁸ For example, the British negotiator stated in September 1997 that '[t]he political pendulum has now started to swing back. Concern for labour and standards and, more strikingly, environmental protection is stronger than in the 1980s': Charles Bridge, 'The OECD Guidelines and the MAI' in OECD, *Proceedings of the Special Session on the Multilateral Agreement on Investment Held in Paris on 17 September 1997* (1997) 17, 17.

¹⁴⁹ Australian Broadcasting Corporation, 'MAI: The Quiet Debate', *Background Briefing, Radio National*, 30 November 1997 <<http://www.abc.net.au/news/features/mai/default.htm>> at 23 September 2002.

¹⁵⁰ James Goodman, 'Stopping the Juggernaut' in James Goodman and Patricia Randal (eds), *Stopping the Juggernaut: Public Interest Versus the Multilateral Agreement on Investment* (2000) 33, 44–7.

¹⁵¹ Stop MAI, 'MAI? Not Now — Not Ever!', *The Australian* (Sydney, Australia), 11 November 1998, 6.

¹⁵² The terms of reference included, for example, 'the ability of countries to pursue social, environmental, labour, cultural, human rights and indigenous protections and the impacts for each of these sectors resulting from foreign investment regimes under the MAI': JSCT, Parliament of Australia, *Multilateral Agreement on Investment: Interim Report* (1998) 7. The broader Senate referral originated from a resolution based on the 'Stop MAI' petition sponsored by the Democrats and supported by the Australian Labour Party, Greens and independent senators: Commonwealth, *Parliamentary Debates*, House of Representatives, 9 March 1998, 610 (Meg Lees).

¹⁵³ JSCT, Parliament of Australia, *Multilateral Agreement on Investment: Final Report* (1999) app 5.

¹⁵⁴ *Ibid* app 1.

MAI.¹⁵⁵ The JSCT inquiry had not finalised its finding when the MAI negotiations ended in December 1998. Nonetheless, the JSCT considered the issues surrounding the MAI sufficiently important to complete its inquiry. The final report of the JSCT on the MAI was released in March 1999. In broad terms, the report criticised the choice of the OECD as a negotiating forum for the MAI but recommended that Australia be involved in any future negotiations towards an ‘agreement for the *regulation* of international capital’.¹⁵⁶

A similar process had occurred earlier in Canada. The Canadian NGO campaign also primarily took the form of a public information campaign. Public education sessions were held in town hall meetings across the country.¹⁵⁷ In June 1997, in the midst of the national election campaign, a coalition of NGOs placed an advertisement attacking the MAI in the *Globe and Mail* national newspaper.¹⁵⁸ In December 1997 the Canadian campaign succeeded in having the MAI reviewed by a parliamentary committee.¹⁵⁹

Opposition in France began to increase in mid 1997 and culminated in public demonstrations and critical press reviews.¹⁶⁰ French NGOs focused on the threat that the MAI might represent to the freedom of French governments to safeguard national cultural interests. As late as October 1997 the French negotiators had described the MAI as ‘a reasonable agreement’.¹⁶¹ But extensive demonstrations advocating a cultural exemption took place in Paris in February 1998, forcing the French Government to reiterate its commitment to a cultural exemption to the MAI.¹⁶² More drastic action soon followed. In May 1998 a special commission was appointed to inquire into the MAI and make recommendations concerning the next steps to be taken. The *Lalumière Report* was issued in October 1998 following extensive NGO consultation.¹⁶³ The adverse findings in that report led to France’s withdrawal from the MAI negotiations on 14 October 1998.¹⁶⁴

After the election of the Blair Labour Government in 1997 there was a steady flow of questions in the UK House of Commons about the impact of the MAI. The Blair Government soon became a champion for the inclusion of core labour

¹⁵⁵ Ibid app 5.

¹⁵⁶ Ibid [8.41] (emphasis added). This conclusion reflects a fundamental misunderstanding of the objectives of the MAI exercise evident throughout both of the JSCT reports. The MAI was never conceived of as an initiative to regulate foreign investors. Instead, it was designed to increase the economic freedom of foreign investors by providing guarantees of investment liberalisation and protection backed up by a process of dispute settlement.

¹⁵⁷ For an indicative list of meetings in cities across Canada, see Council of Canadians, above n 115, 31–5.

¹⁵⁸ Smythe, above n 136, 86.

¹⁵⁹ Sub-Committee on International Trade, Trade Disputes and Investment, House of Commons Canada, House of Commons Standing Committee on Foreign Affairs and International Trade Subcommittee on Trade, Trade Disputes and Investment, *Canada and the MAI: First Report of the Subcommittee* (1997).

¹⁶⁰ Nuri Albala, ‘Un verrou juridique contre les Etats: Les dangers de l’accord multilatéral sur l’investissement’, *Le Monde Diplomatique* (Paris, France), March 1998, 4–5 (‘Shackling the State: The Dangers of the Multilateral Agreement on Investment’).

¹⁶¹ OECD, *Multilateral Agreement on Investment: State of Play in October 1997* (1997) 36.

¹⁶² Ministère de L’Economie, France, *Négociation de l’accord multilatéral sur l’investissement* (12 February 1998).

¹⁶³ Lalumière and Landau, above n 57.

¹⁶⁴ Henderson, above n 54, 43.

and environmental standards in the draft treaty.¹⁶⁵ Parliamentary questions about the impact of the MAI were also raised in the context of British international developmental assistance. This led to a comprehensive report, commissioned by the UK Department for International Development, assessing the developmental implications of the MAI.¹⁶⁶

In the US, environmental and social justice NGOs such as Public Citizen took a lead role in opposing the MAI. With support from some members of the US House of Representatives, a one-day hearing was held in the House of Representatives in March 1998. In the broader political context, the Clinton Government failed to obtain 'fast track' negotiation authority for the MAI from the US legislative branch.¹⁶⁷ This defeat, combined with the onset of an election year, resulted in a loss of momentum towards the MAI by the US negotiators.

Conversely and somewhat ironically, aside from the clear link between the NGO campaign and growing public opposition to the MAI throughout 1997 and 1998, the NGO campaign also resulted in a more constructive outcome. NGO concern as to the breadth of the *NAFTA*-like investor protection provisions in the MAI contributed to the release in 1998 of the Chairperson's package on environmental and labour provisions.¹⁶⁸ The package contains a variety of different initiatives varying in degrees of strength and specificity. At one end of the spectrum, it proposed the inclusion of preambular references to international declarations on the environment and labour. But there were more substantive attempts to address some of the problems of replicating the *NAFTA* Chapter 11 model. For example, within the investment protection provisions, the package proposed an interpretative note to limit the ability of investors to challenge non-discriminatory regulations as forms of creeping or indirect expropriation.¹⁶⁹ Unfortunately, the release of that package was far too late as it only preceded the French withdrawal from the MAI negotiations by seven months.

¹⁶⁵ UK Department for International Development, *The Development Implications of the Multilateral Agreement on Investment* (1998) 51.

¹⁶⁶ *Ibid.*

¹⁶⁷ Under the *US Constitution*, the US Congress has ultimate authority over matters of foreign commerce. But, in the past, it has delegated that function to the executive branch during, for example, the Uruguay Round of GATT/WTO negotiations and the *NAFTA* negotiations. See generally Graham, above n 45, 19.

¹⁶⁸ OECD, *Chairman's Note*, above n 69.

¹⁶⁹ The proposed interpretative note reads as follows:

* Interpretative Note: Articles __ on General Treatment, and __ on Expropriation and Compensation, are intended to incorporate into the MAI existing international legal norms. The reference in Article IV.2.1 to expropriation or nationalisation and 'measures tantamount to expropriation or nationalisation' reflects the fact that international law requires compensation for an expropriatory taking without regard to the label applied to it, even if title to the property is not taken. *It does not establish a new requirement that Parties pay compensation for losses which an investor or investment may incur through regulation, revenue raising and other normal activity in the public interest undertaken by governments.* Nor would such normal and non-discriminatory government activity contravene the standards in Article __ .1 (General Treatment).

OECD, *Chairman's Note*, above n 69, 6 (emphasis added).

V CONCLUSION

There is little doubt that the Internet has dramatically increased the effectiveness of advocacy NGOs and especially their capacity to influence public opinion. The ability to share information and coordinate activities across national borders was particularly evidenced in the NGO campaign against the MAI. Whilst the NGO campaign was but one factor that led to the cessation of negotiations, it proved remarkably effective in mobilising public opinion against the MAI.

However, the ability of NGOs to engender public opposition to the MAI was, to some degree, linked to the poor efforts of the OECD in releasing information about the MAI. Many of the general NGO critiques that overstated the breadth of operation of the MAI were based on a leaked negotiating text with little substantive guidance on key aspects of the agreement. Without a clear analysis from the OECD of both the text and the likely benefits to flow from increased foreign investment, NGOs were easily able to depict the MAI as a lightning rod for public fears of the perceived excesses of economic globalisation. It was only late in the negotiations that a belated effort was made by the OECD to address this concern. Yet, at the same time, there is clear evidence in this case study of the ability of NGOs to act as intellectual competitors to trade and investment fora. The NGO campaign also relied on the problematic similarities between the investment protection provisions in the MAI and those of *NAFTA* Chapter 11. The *NAFTA* states are still struggling to find a solution for the difficulties that have arisen due to the broad formulation of those provisions.

Thus the case study seems to confirm that the impact of the Internet gives some degree of support to both proponents and opponents of greater NGO access to trade and investment negotiations. However, on the whole, it is submitted that the case study pushes the debate slightly in favour of greater NGO access. The primary reason for this is the powerful fact that the Internet dramatically empowers NGOs to assist in the sensitive process of conferring (or opposing) public approval, and hence legitimacy for new agreements. As the work of bodies like the WTO now moves further beyond tariff reduction, the need to engender broader forms of public support is heightened.

However, the case study only deals with part of the problem. Clearly, the next question is how to provide for greater access or even participatory opportunities in negotiations for NGOs. A variety of suggestions have been put forward on this point within the academic literature on this subject.¹⁷⁰ It is beyond the scope of this article to address that question in detail. However, there is nothing in the case study to indicate that the legitimate concerns about the representativeness and accountability of NGOs are somehow overcome by the impact of the Internet. If anything, the Internet appears to exacerbate these problems. Thus it is submitted that there is no substantive justification for giving NGOs direct participatory opportunities at the negotiating table. That is properly the province of representative national governments. However, the case study does suggest a more modest step towards creating broader NGO (and public) access to these negotiations; namely, increasing the transparency of the negotiating process.

¹⁷⁰ Dymond, above n 46, 49; Henderson, above n 54, 70; Housman, above n 15, 743–46; P Simmons, 'Learning to Live with NGOs' (1998) 112 *Foreign Policy* 82, 90–5.

This could comprise two steps. First, the start of negotiations should be marked by a greater attempt to build public support for negotiations by explaining the rationale for, and expected benefits and costs to flow from, the planned agreement. This type of positive transparency might even go some way in preemptively addressing unjustified attacks by NGOs that seek an obstructive role in the negotiations. Secondly, greater attention should be given to derestricting and making public key documents involved in the negotiations. The question of which documents to make public and when is an inherently sensitive one.¹⁷¹ However, it will be increasingly difficult for negotiating fora to resist releasing some information, particularly given growing public expectations of transparency (partly driven by the Internet). Moving on this path could possibly even enhance the ability of NGOs to act as intellectual competitors in negotiating fora. NGOs might then at least be forced to justify their critiques against a benchmark of accurate and authorised materials rather than, as in the MAI episode, using leaked and incomplete information about negotiations.

¹⁷¹ This was evidenced recently in discussions in the WTO on document derestriction. After four years of talks, WTO members recently agreed to loosen the rules on the public release of restricted papers. Where a delegation asks that a document produced by the WTO be derestricted, the waiting time for derestriction has been reduced from approximately eight months to six to eight weeks. This agreement represents a compromise between developed country members (who pushed for automatic derestriction as they post most of their own documents on their publicly-accessible websites) and some developing country members including India and Malaysia (who wanted to give their capitals time to review papers before circulation). See WTO, *Procedures for the Circulation and Derestriction of WTO Documents*, WTO Doc WT/GC/W/464/Rev.1 (2002) (Revised Draft Decision of the General Council). See also Jürgen Kurtz, 'WTO Updates Info Dissemination, Discusses Internal Transparency' (2002) 6 *Bridges Weekly Trade News Digest* <<http://www.ictsd.org/weekly/02-05-15/story1.htm>> at 23 September 2002.