This chapter offers a critical analysis of the MAI, to show why a new approach is needed towards the establishment of a multilateral framework for international investment. It argues that the negotiations for a MAI at the OECD were misconceived, as became clear with the failure to reach agreement on a text for approval by the OECD Ministerial Council in May 1998, and the suspension of the negotiations in October, with the withdrawal of the French government. The draft text of the MAI was the product of the mandate given to the ‘high-level negotiating group’ in May 1995, following four years of preparatory work. The group was asked to draw up an agreement which would ‘provide a broad multilateral framework for international investment with high standards for the liberalization of investment regimes and investment protection and with effective dispute-settlement procedures’. The fundamental flaws in the resulting draft can be traced to that initial and little-noticed decision.

That decision was mistaken on three grounds.

1. The choice of the OECD as a forum, while aiming for a ‘free-standing’ agreement open to accession by all states, whether developed or developing, repeated the tactic of using a negotiation among like-minded developed countries to set the terms for wider global agendas. In this instance, however, it succeeded only in highlighting the problems even within the OECD area of the one-sided pursuit of liberalization, while discrediting the OECD as an illegitimate forum to negotiate an agreement aiming to encompass countries outside its own membership.

2. The aim of a ‘high standards’ agreement was either intended or interpreted to mean one which would constrain government powers of intervention in market mechanisms. As a result, the negotiations failed to address the central problem of globalization, which is how to balance liberalization with a positive framework of regulation.

3. By entrusting the negotiations to a special group operating outside the OECD’s normal committee structure, the implications of liberalization commitments for many areas of regulation, such as taxation or intellectual property protection, appear to have been brought home to the negotiators only late in the day. Consultations with sectoral specialists...
A Critical Assessment of the MAI

83

attempted to accommodate some regulatory issues through large carve-outs or special provisions, or took place at national level, so that their objections were rolled into national negotiating positions for specific exceptions. The result was a gruyère cheese of an agreement, which many said had more holes than cheese.

Thus, the MAI was a false start. A new approach should aim at beginning to construct a more balanced framework, which makes liberalization conditional on strengthened international regulatory standards and arrangements for their enforcement. This is the only way to build a sufficiently strong foundation of political support and public confidence, on which safe and secure markets must rely. The failure of the MAI in this respect is evident not only from the growing political opposition it faced, but also in the very texture of the draft agreement itself. This chapter aims to demonstrate this through an analysis of the structure and main provisions of the draft agreement, and an evaluation of its implications and effects against the claims made for it by its advocates. Despite suspension of the OECD negotiations, similar proposals will undoubtedly be put forward elsewhere, and a detailed understanding of their implications is important.

THE MAI’S BROAD OBLIGATIONS

The MAI was based on two central obligations: (a) the protection of investments, and (b) the liberalization of investment rules. These would impose broad restrictions on how states could treat investors from MAI members and their investments, very broadly defined to include contractual as well as property rights. It would establish a general non-discrimination standard based on National Treatment (NT) and Most Favoured Nation (MFN) treatment for such investments. It required a guarantee against expropriation of investments (direct and indirect), and the right for foreign investors to repatriate all profits and other returns without restriction. To ensure that these rights would over-ride local laws, both foreign investors and their home states would be given the right to binding international arbitration of their claims.

The negotiators aimed to establish these obligations at as high a level as possible, taking the strongest precedents from existing investment treaties. The implications of establishing strong versions of these principles as a global legal standard, especially if backed by binding dispute-settlement, would indeed be far-reaching. They would impose obligations, or