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Multilateral Agreement on Investment: Implications for the United States

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ABSTRACT

The United States is negotiating with Ministers from the other developed economies on a Multilateral Agreement on Investment (MAI). U.S. negotiators are dissatisfied with the current draft of the agreement and oppose setting new deadlines for completing the long and divisive negotiations. Should the Ministers resolve the myriad outstanding issues, the measure will be forwarded to the Senate for consideration as a treaty. This report will be updated as developments require.

Multilateral Agreement on Investment: Implications for the United States

Summary

Ministers of the 29 members of the Organization for Economic Cooperation and Development (OECD) have struggled since 1995 to negotiate a Multilateral Agreement on Investment (MAI). Negotiations on many aspects of a final agreement have progressed rapidly, but OECD members have been unable to resolve numerous thorny issues before the latest deadline set for the OECD Ministerial meeting in April 1998. U.S. negotiators have indicated that they will not sign the present agreement without significant changes and oppose establishing another deadline.

As a whole, the OECD favors eliminating most of the national rules governing inward and outward direct investment. One notable exception would be exemptions for each country for industries or sectors that individual members deem to be of national security or of especial national importance. The United States also favors the national, or unbiased, treatment of foreign direct investment. At times, however, the U.S. commitment to this standard has waned as other policy objectives have taken precedent. Presently, the United States is leading the way for the other developed countries to adopt a more open standard with an agreed upon, and enforceable, dispute settlement procedure.

The OECD ministers' stated goal in adopting a MAI is to create a strong and comprehensive legal framework on foreign direct investment among the participating countries. This agreement is intended to be a stand-alone agreement and to be accessible to any country, developed, or developing, that is willing to abide by its precepts. Through the MAI, the OECD members also seek to reduce barriers and discriminatory treatment of foreign direct investment and to increase the legal security for investments and investors. To give force to this agreement, the MAI will be legally binding and contain effective provisions for settling disputes.

Despite overall progress on the agreement, a number of issues remain. In particular, negotiators have not agreed on how many and what type of exceptions nations will be allowed to take. The United States also is taking issue with the European Commission over its request for a broad exception for regional economic integration organizations. U.S. negotiators believe this type of exception will allow the Commission to exclude itself from parts of the agreement and to discriminate in favor of European Union member states.

U.S. negotiators also have to consider how the Clinton Administration will approach the issue of an MAI with the Congress. The Administration is concerned about the timing and approach of bringing the issue before Congress so that the agreement does not interfere with such other trade issues as the debate over fast-track negotiating authority. At the least, Congress likely will be asked to approve the agreement as a treaty. It is not clear if any additional legislative action will be required.

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Multilateral Agreement on Investment: Implications for the United States

Overview

Since May 1995, ministers of the 29 members of the Organization for Economic Cooperation and Development (OECD)[1] have struggled to negotiate a Multilateral

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[1]Since May 1995, the OECD has added two members. The member countries of the OECD are: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, New Zealand, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey,
(continued...)

Agreement on Investment (MAI). Negotiators are building on previous experience with overseas direct investment within the OECD in formulating a new set of rules. These rules, in turn, are intended to become the basis for a freestanding international treaty open to all OECD Members and all non-OECD countries.

Negotiations on many aspects of a final agreement have progressed rapidly. The OECD members, however, could not finalize an agreement before the initial deadline set for the OECD Ministerial meeting in May 1997 and agreed to extend the deadline for a year. U.S. negotiators, who pressed for an extension in the negotiations of one year past the original deadline to resolve a number of outstanding issues, now oppose establishing additional deadlines.[2]

U.S. officials have agreed to continue negotiations on the MAI, but are not willing to sign a statement of political intent prior to the April 1998 meeting of OECD ministers. They are leery of the large number of exceptions European members are requesting for industrial sectors within their economies, a move the U.S. negotiators believe would render the agreement meaningless. Assuming an accord can be reached, the Clinton Administration has indicated that it will forward the agreement to the Senate as a treaty.

Background

As a whole, the OECD favors eliminating most of the national rules governing inward and outward direct investment. Each country is allowed exemptions, or reservations, for industries or economic sectors deemed to be of national importance, or for matters of national security. The robust growth many developed economies experienced in overseas investment in the early 1990s, however, is spurring the OECD countries to remove a broad range of national restrictions on direct investment and to develop an international agreement on investment rules. As figure 1 shows, foreign direct investment by the OECD countries more than quadrupled over the 1983-1994 period, rising from $447 billion in 1983 to $2.1 trillion in 1994.[3] This growth in foreign investment reflects the view of many firms that overseas investment is an essential component of their overall business strategy and is a complement to their export efforts. As one OECD official states:

> .... Although investments abroad by the largest firms are by no means a new phenomenon, a growing number of firms now view overseas expansion through direct investment as a necessity, with the aim often being to achieve more effective access in markets where the investor is presently under represented. In many cases these investments have the effect of

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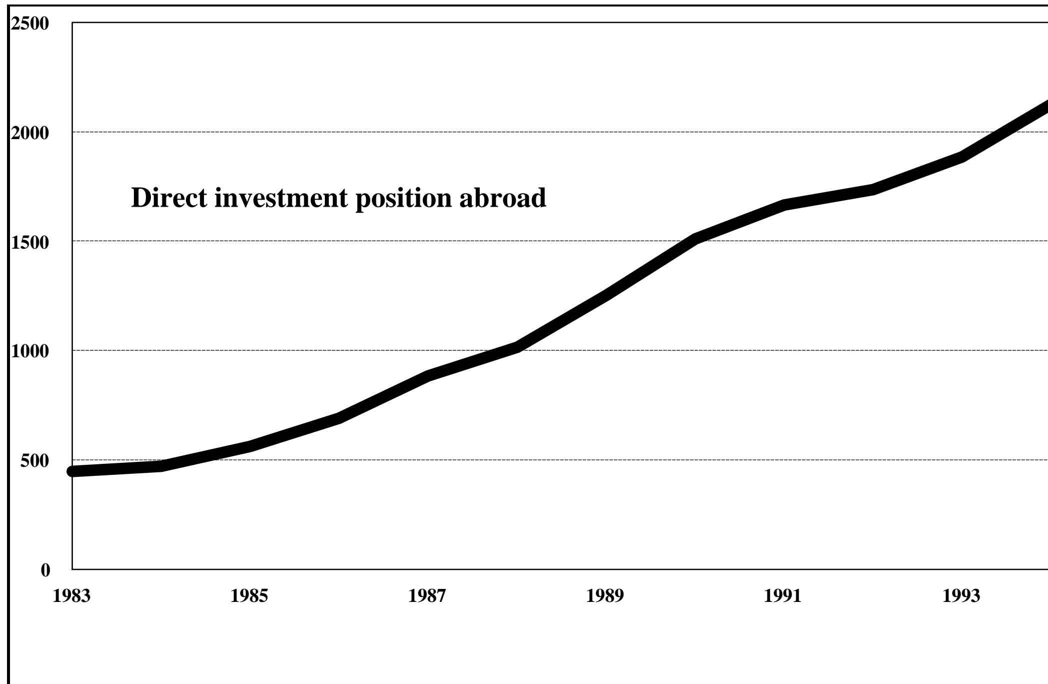
[1](...continued)
United Kingdom, and United States.

[2]U.S. Pressing to Delay Conclusion of OECD Investment Pact to May 1998. *Inside U.S. Trade*, April 4, 1997.

[3]*International Direct Investment Statistics Yearbook 1996.* Paris, Organization for Economic Cooperation and Development. 1996. Table 8, various countries.

leading to increased trade flows as well, demonstrating that investment and trade flows very often interact in a complementary manner.[4]

Figure 1 Direct Investment Position Abroad of OECD Countries in billions of U.S. dollars, 1983-1994



As figure 2 shows, the majority of foreign direct investment, whether from the United States, the European Community,[5] or Japan, is in the developed economies of the OECD. Direct investment in OECD countries accounts for over two-thirds of Japan's $464 billion in investments, three-fourths of the United States' $621 billion in investments and over 80% of the nearly $1 trillion in the EC's investments (for detailed data, see Table A1.). U.S. and EC direct investment abroad is focused heavily on investments within the EC itself. U.S. investment in the EC amounted to $261 billion in 1994, about 42% of the total U.S. direct investment abroad. U.S. investments in non-EC developed countries account for 12% of U.S. direct investment abroad, more than twice the comparable shares for Japan or the EC. Japanese and EC investments are heavily focused on North America, especially on the United States. Japanese investors have placed 44% of their investments in North America, while EC countries have placed over one-fourth of their investments in North America.

Investments in non-OECD countries follow a vague pattern of specialization among the three major investors: the United States, the EC, and Japan. As figure 3

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[4]Witherell, William H. Developing International Rules For Foreign Investment: OECD's Multilateral Agreement on Investment. *Business Economics*, January, 1997. p. 33.

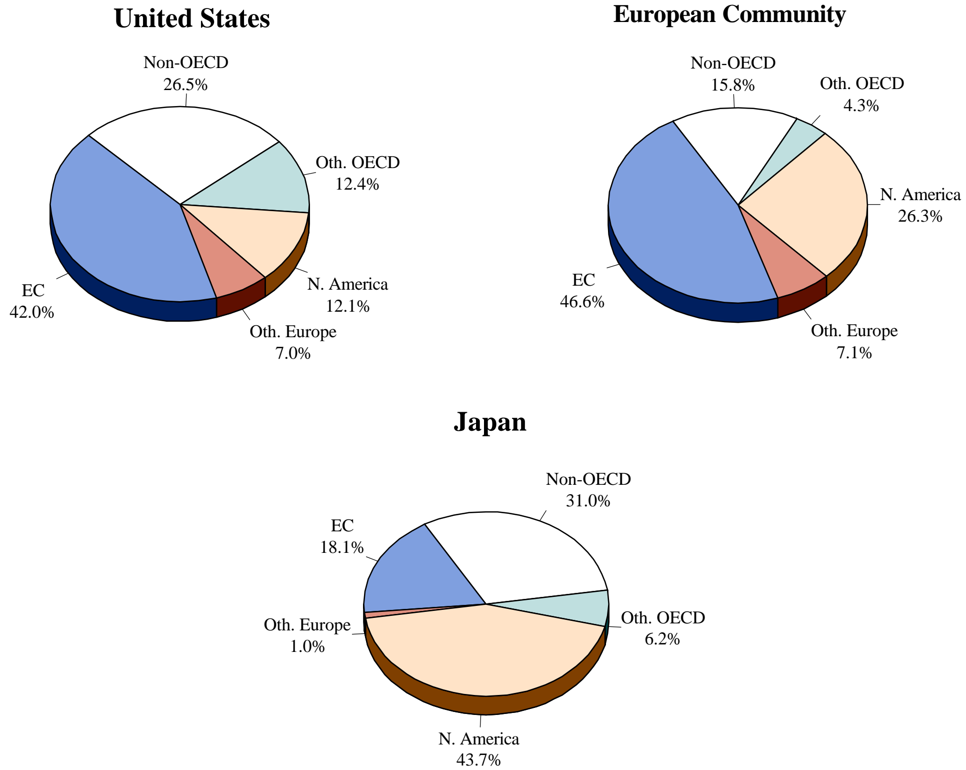
[5]These data were prepared by the OECD prior to the shift by the European Community to the European Union and the subsequent increase in the number of member countries.

shows, U.S. investments are more heavily concentrated in Latin America, accounting for 60% of U.S. investments in non-OECD countries. The EC has a higher concentration of investments in Africa and Central Europe than either the United States or Japan, although a sizeable portion of the EC's non-OECD investments are in Latin America (46%) and Southeast Asia (34%). Japanese investors have focused over 50% of their investments in Southeast Asia, while the share of Japanese investments in Latin America rank third among the three investors. Japanese investors, however, have invested less than 1% of their non-OECD investments, in Central Europe.

U.S. Overseas Investment Policy

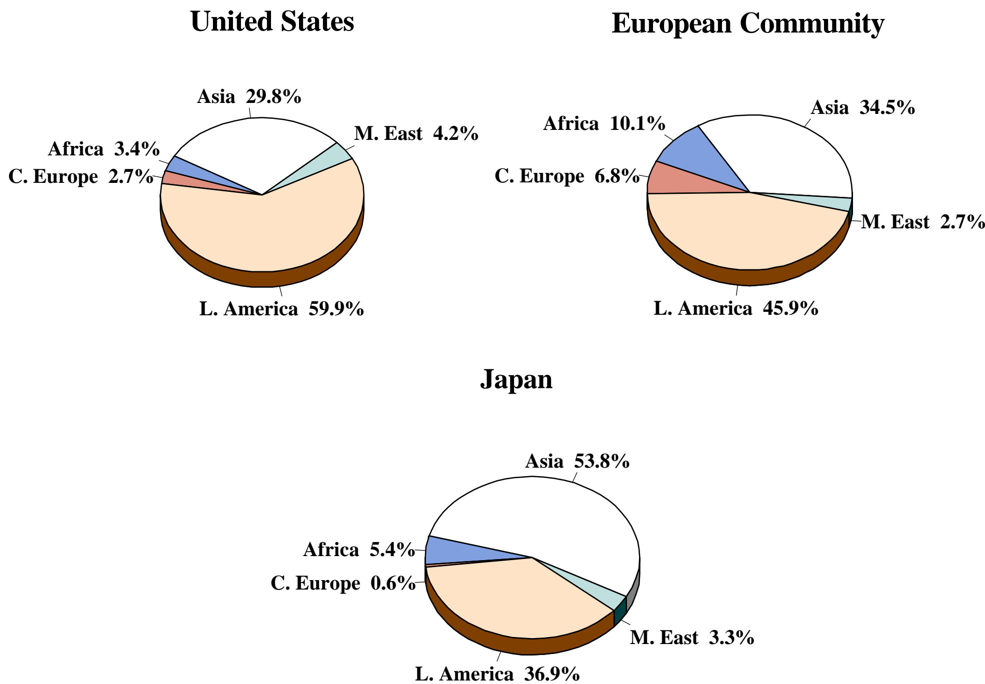
Following the end of World War II, U.S. firms invested abroad in record amounts. The period prior to 1960 has been named by some observers as the "American phase" because American firms so dominated overseas investing during this period. U.S. investments during this phase were focused on large-scale investments in petroleum and raw materials in Latin America, the Middle East, and Canada. By 1960, as the European Economic Community began to take shape, U.S. firms shifted their investment focus to Europe to overcome the high and uniform tariff wall that was taking shape around Western Europe. By the end of the decade, many European firms had also expanded to become global firms and had joined the ranks of American multinational corporations (MNCs). By the 1980s, Japanese and European firms, and to a lesser extent firms of other Asian countries, also became major international investors.

Figure 2. U.S., E.C., and Japanese Direct Investment Position Abroad 1994; Geographic Regions (percent of total overseas direct investment position)



Source: *Organization for Economic Cooperation and Development*

Figure 3. U.S., E.C., and Japanese Direct Investment Position Abroad, 1994 Non-OECD Geographic Regions (percent of total non-OECD overseas direct investment position)



Source: *Organization for Economic Cooperation and Development*

The United States has generally favored the national, or unbiased, treatment of foreign direct investment. At times, however, U.S. commitment to this policy has been overwhelmed by other issues, or has been diluted by other, sometimes conflicting, policy objectives. Initially, U.S. government actions concerning foreign investment revolved around efforts to negotiate Friendship, Commerce, and Navigation treaties with other governments. One author argues that the United States did not have a distinct, comprehensive foreign investment policy, but a group of disparate policies:

> ... U.S. parent investment policy was so fragmented that it is more accurate to describe it as a number of distinct policies, which sometimes touched or became entangled, but never quite meshed into a single systematic and coherent policy. These distinct policies include the following: 1) a balance of payments policy, which entailed the discouragement of an outward flow of U.S. capital; 2) a policy to the developing world which relied on private foreign investment as a supplementary tool for development assistance, but also provided guarantees, protection, and diplomatic assistance to the U.S. investor should problems arise with the host government; 3) a third country policy

> which discouraged trade with Communist countries by prohibiting exports from the subsidiaries of American MNCs; 4) a tax policy on U.S. MNCs which sometimes served to encourage, sometimes to discourage foreign investment, and sometimes was neutral; and 5) the extraterritorial application of domestic law like antitrust and securities disclosure; and 6) the use of foreign investors as overt and covert instruments of American diplomacy.[6]

In 1961, the governments of the OECD adopted a Code of Liberalization of Capital Movements. Though not legally binding, the code set rules for the flow of transnational investment and established a mechanism for consultation when restrictions on capital movements were felt necessary by a government. During the same year, President Kennedy announced measures to stem the outflow of capital from the United States to check the growing U.S. balance of payments deficit. Furthermore, in 1963, President Kennedy urged Congress to pass the Interest Equalization Tax (IET) on the purchase of foreign stock by U.S citizens. As the U.S. balance of payments condition worsened, President Johnson announced in 1965 a Voluntary Foreign Credit Restraint Program (VFCR) to curb bank lending and to urge businessmen to reduce their foreign investment.[7] In 1968, President Johnson issued an Executive Order setting mandatory ceilings on foreign investment.[8]

These measures proved to be ineffective and eventually were removed. One factor that contributed to the demise of the controls on foreign investment was a set of contradictory U.S. policies. One of these policies encouraged U.S. firms to invest in developing countries for foreign policy reasons. To assist U.S. firms in this endeavor, the U.S. government established the Overseas Private Investment Corporation (OPIC) in 1969. (The 105th Congress considered a proposal to eliminate OPIC.)[9]

Existing Arrangements Governing Foreign Investment

Existing arrangements governing foreign investment include a wide variety of instruments that differ in their legal character, scope, and subject matter.[10] The United Nations reports that since the early 1980s, a growing number of countries have changed their policies on foreign direct investment by encouraging and facilitating

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[6]Pastor, Robert A. *Congress and the Politics of U.S. Foreign Economic Policy: 1929-1976.* Berkeley, University of California Press, 1980. pp. 209-210.

[7]Ibid., p. 212.

[8]Kindleberger, Charles P. *The International Corporation*. Cambridge, the M.I.T. Press, 1970. pp. 101-103.

[9]For additional information, see: U.S. Library of Congress. Congressional Research Service. *The Overseas Private Investment Corporation: Reauthorization and Funding*. CRS Report 97-132 E, by James K. Jackson.

[10]*Annual Report, 1996.* World Trade Organization, 1996. P. 61.

such investment.[11] This type of activity picked up speed in the 1990s as many nations altered their domestic laws that govern foreign investment and as nations increased their use of bilateral investment treaties. Nearly two-thirds of the 1,200 bilateral investment treaties that were concluded prior to July 1996 were concluded during the 1990s.[12]

Bilateral Investment Treaties

Bilateral investment treaties have emerged as the favored investment instrument, because previous attempts at developing multilateral agreements have been so unsuccessful. There are two main approaches used in admitting foreign investment under bilateral treaties. The United States requires that nations apply most favored nation (MFN), or non-discriminatory, treatment and that countries also observe national treatment with respect to both the admission and the subsequent treatment of foreign direct investment. Exceptions are made for industries or areas reserved for national security, or for other national objectives. In contrast, most other nations apply bilateral treaties that require nations to encourage and to admit into their territories investments by nationals and companies of the other party. This commitment, however, is subject to any existing or future restrictions on the entry of foreign investment contained in domestic laws, which historically have been applied to investments only after they have been admitted into a country.

According to the World Trade Organization (WTO), general standards of treatment of foreign investment commonly found in bilateral investment treaties include a number of measures. Such measures generally require that investments be accorded fair and equitable treatment, full protection and security, and that nations refrain from interfering in ways that disrupt the normal management, maintenance, use or disposal of investments. In addition, most treaties accord the parties involved most favored nation and national treatment standards.[13]

Multilateral Investment Treaties

At the multilateral, or multi-nation, level, there are at lest two major types of arrangements. There are investment treaties that are part of broader arrangements that aim to integrate rules on foreign investment into a framework of rules geared toward economic cooperation and integration. Such arrangements include the treaty establishing the European Community and the North American Free Trade Agreement. In addition, there are arrangements which cover only foreign investment. Of particular prominence among this second group is the OECD Code of Liberalization of Capital Movements and the Code of Liberalization of Current Invisible Operations. In addition, the OECD has issued a basic statement on foreign investment, The Declaration on International Investment and Multinational Enterprises.

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[11] *World Investment Report 1994: Transnational Corporations, Employment, and the Workplace.* New York, United Nations, 1994. p. 277.

[12] *Annual Report* 1996, p. 62.

[13] Ibid., pp. 62-63.

The Declaration on International Investment and Multinational Enterprises. The members of the OECD adopted this Declaration on June 21, 1976, and then updated it in 1979, 1984, and 1991. The Declaration is not a legally binding treaty, but it is a general statement of policy regarding foreign investment. Member countries are expected to accord multinational enterprises national treatment and to assure that this treatment is followed at the sub-national level. The Declaration makes note of the use of incentives or disincentives by governments, and requires member countries to make such measures as transparent as possible so that "their importance and purpose can be ascertained."

The OECD Code of Liberalization of Capital Movements. This and the companion code on invisible operations are legally binding on OECD members, although there is no enforcement mechanism. Instead, the code provides a framework of notification, examination, and consultation. This and the companion code on current invisible operations are meant to promote the removal of restrictions on capital movements, including foreign investment and the repatriation of profits.

The OECD Code of Liberalization of Current Invisible Operations. The purpose of this code is to encourage nations to remove or to reduce restrictions on current payments and transfers of funds. "Invisible" is the general term the OECD applies to all financial exchanges in which no merchandise is involved. Within this group there are current and capital operations, consisting primarily of a transaction between two parties and a related transfer of money. The code's obligations also extend to ensure that the underlying transactions themselves are not frustrated by legal or administrative regulations.

Trade-Related Investment Measures (TRIMs). The Uruguay Round of trade negotiations did not include negotiations explicitly on foreign direct investment. As a result, the TRIMs Agreement was more modest than the United States had hoped for. The Agreement did not add to any of the obligations then existing under the General Agreement on Tariffs and Trade (GATT) — now the WTO, but clarified the obligations existing at the time. The Agreement provides a procedure for more effective compliance with the national treatment obligations.[14]

The World Trade Organization (WTO). Investment is one of a number of thorny issues facing the WTO. As a result of a handful of countries, members of the WTO have been unable to agree on who would chair a working group on investment, or on what issues the group should consider.[15]

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[14]*World Investment Report 1994*, p. 280.

[15]WTO Haggling Over Plans on Investment, Competition, Procurement. *Inside U.S. Trade*, March 14, 1997. p. 17.

The Scope of the MAI

Despite the rapid growth in foreign direct investment, foreign investors still encounter barriers, discriminatory treatment, and legal and regulatory uncertainties.[16] Spurred by these and other problems facing firms that attempt to invest abroad, the OECD governments decided to begin negotiations among themselves on a MAI and to conclude the agreement by the time of the OECD Ministerial meeting in May 1997. The goal of the negotiations is "to create a strong and comprehensive legal framework for foreign direct investment among the participating countries," according to a senior OECD official.[17] This means the MAI will seek to reduce barriers and discriminatory treatment of foreign direct investment and to increase the legal security for investments and investors. To give force to the agreement, the MAI will be legally binding and contain effective provisions for settling disputes. The basic outlines of the MAI include the following areas:

> *Definitions and Scope*. The aim of the MAI negotiations is to develop a comprehensive definition of direct investment for all countries that will cover all tangible and intangible assets, but not include financial transactions that have no connection to an investment.
>
> *Investment Protection*. The member countries of the OECD basically agree on such issues as a general standard of treatment of foreign investment and investors, compensation in the event of expropriation, protection from strife, and the free transfer of funds.
>
> *The Treatment of Investors and Investments*. Provisions are being drafted to cover both the entry of investments and the treatment of foreign enterprises after they are established in host countries. These provisions are based on the concept of national, or nondiscriminatory, treatment. Also, the provisions will assure most favored nation (MFN) treatment and transparency in national conduct toward foreign investment and investors. Exclusions for purposes of national security likely will be included. Several approaches concerning the environment are being discussed, including a provision which calls on governments not to lower environmental standards in an effort to attract foreign investment.
>
> *Additional Disciplines*. These provisions include a wide range of investment areas, such as "key personnel" provisions that would address the wish of international firms to be able to transfer freely, or to hire, personnel to perform vital functions. In particular, MAI negotiators are considering rules that would assure firms the right of temporary entry, stay and work for key personnel. Additional areas include the participation of foreigners in privatization programs, performance requirements (export requirements, local sales, content and production requirements,

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[16] Witherell, William H. Developing International Rules for Foreign Investment: OECD's Multilateral Agreement on Investment. *Business Economics*, January 1997. p. 39.

[17] Ibid., p. 40.

employment and investment requirements), monopolies and state enterprises, investment incentives[18], and corporate practices.

Dispute Settlement. The agreement will encourage consultation arrangements to encourage amicable solutions to investment disputes. Binding arbitration of disputes between states or between an investor and a participating government will also be available to ensure that there is an effective recourse in the event of a breach of an agreement.[19]

The Treatment of Taxation. OECD members apparently have been concerned that obligations placed on nations concerning national treatment, non-discrimination and most favored nation treatment under the MAI could conflict with obligations nations have accepted in bilateral agreements on the avoidance of double taxation.[20] As a result, the members agreed not to adopt a code of national treatment on taxation, but, instead, to develop a "political commitment" not to discriminate in taxation matters. Such a commitment would not be subject to the MAI's dispute settlement mechanism.[21]

Unresolved Issues

A number of issues still need to be resolved before any final agreement can be reached. One of the thorniest issues is how many and what type of exceptions nations will be allowed to take. Every nation wants some industries or areas exempted from unfettered national control, either because of national security concerns or because of specific domestic political issues. Too many exemptions, however, would render the MAI useless and ineffective. The United States also is taking issue with the European Commission over its request for a broad exception for regional economic integration organizations. U.S. negotiators believe this type of exception would allow the Commission to derogate from the MAI national treatment obligations and discriminate in favor of European Union member states.[22]

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[18]The number of countries offering foreign firms investment incentives has grown sharply over the last decade. Nevertheless, few are willing to consider restrictions on such incentives beyond the limitations imposed by rules on non-discrimination. While the negotiators appear to favor the principle that rules on national treatment should apply to incentives, it appears unlikely the negotiating group will reach a consensus before the May 1997 deadline. Negotiators increasingly are supporting postponing any further consideration of incentives until after May 1997. Ahnlid, Anders. *The Multilateral Agreement on Investment: Special Topics.* Available at the OECD website: [http://www.oecd.org].

[19]Ibid., pp. 40-41.

[20]Engering, F.M. *The Multilateral Agreement on Investment: Progress and Prospects*. Available from the OECD site on the World Wide Web: [http://www.oecd.org].

[21]Negotiators Near Accord on Tax Issues in OECD Multinational Investment Agreement. *International Trade Reporter*, September 24, 1997. P. 1606.

[22]Larson Hints at Possible Delay...., *Inside U.S. Trade*, p. 12.

Bribery

The United States wants "concrete commitments" to criminalize overseas bribery. In essence, U.S. negotiators are pressing other nations to adopt legislation similar to the U.S. Foreign Corrupt Practices Act.[23] Many OECD members have argued against criminalizing bribery until there is an international agreement on bribery. U.S. negotiators are concerned that developing such a pact likely would take years to hammer out and still would not be effective until the members adopted national implementing legislation. The United States also is pressing to have member countries eliminate the tax deductibility of bribes.

Dispute Settlement

Dispute settlement is another outstanding issue that still needs to be resolved. OECD members have begun drawing up their own lists of those investment sectors and areas they want to be exempted from the MAI. While the United States considers these lists as first round offers in a negotiable process, some European members believe the lists represent their notification to the OECD of places where their domestic laws differ from the proposed MAI and are not necessarily negotiable. Several of these members are waiting for more precise MAI disciplines to be drafted before they will negotiate further on their own list of exceptions. Members also are split over how rulings on state to state disputes will be enforced. While all members apparently want to have an enforcement mechanism in case a MAI signatory country does not comply with a ruling, they disagree over whether the mechanism should fall within or outside the scope of the overall agreement. Some members argue that countries that fail to comply with a MAI ruling should be denied access to future dispute settlement procedures, while other members want the ability to retaliate outside the scope of the obligations covered by the agreement by employing such additional measures as trade sanctions.[24]

One area where the negotiators have made progress is in investor-state disputes. To satisfy Japanese negotiators, the members agreed to a two-stage process to review complaints so that "frivolous" complaints could be eliminated before a full panel review of a complaint. Members also agreed that the MAI can enforce investor-state disputes by issuing declarations against a signatory that does not comply with a ruling and to award monetary compensation plus interest or in-kind restitution. Members have the ability to nullify rulings that are deemed to be "aberrant."

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[23]P.L. 95-213, December 19, 1977. The act prohibits U.S. persons or companies from bribing foreign government officials to win business. The act also covers joint ventures with state-owned companies, transactions with relatives of senior government officials, retention of agents and consultants, gifts, entertainment, selection of officers and directors, and other business activities abroad. Low, Lucinda A., and Kathryn Cameron Atkinson. The World Wages War on Corruption. *The National Law Journal*, March 3, 1997. p. b9.

[24]OECD Progresses on MAI Dispute Plans But Split on Enforcement. *Inside U.S. Trade,* March 14, 1997. p. 13.

U.S. Issues

Another issue under the rubric of enforcement that interests the United States is the way in which MAI rulings will be applied to such subfederal entities as states and municipalities. U.S. negotiators have indicated that the United States will bind states to comply with MAI rulings as long as the MAI offers an "acceptable" level of liberalization, or market access.[25] In its list of reservations, for instance, the United States has included state measures that would violate the MAI, implying its willingness to override those state measures to bring the states in accordance with the MAI.[26]

U.S. negotiators, however, do not have unlimited authority to negotiate the MAI. Moreover, some groups and some Members of Congress have concerns over the impact an international investment agreement could have on the U.S. economy and on U.S. environmental and labor standards. As a reflection of these concerns, part of the legislation to reauthorize fast track procedures[27] for implementing trade agreements, the Senate Finance Committee's proposed "Export Expansion and Reciprocal Trade Agreements Act of 1997," specifies a set of overall negotiating objectives for a broad range of agreements, including foreign investment. The proposed legislation states that the principal U.S. negotiating objective regarding foreign investment is:

> ...to reduce or eliminate artificial or trade-distorting barriers to U.S. investment, to expand the principle of national treatment, and to reduce unreasonable barriers to establishment.

Furthermore, the proposed legislation states that it is the objective of the United States to "develop internationally agreed rules through the negotiation of investment agreements." Nevertheless, the legislation also states that the negotiating objectives on foreign investment, "shall not be construed to authorize any modification of United States law."

During discussions in March 1997, U.S. negotiators pressed for an extension in the negotiations of one year past the original deadline to resolve more of the outstanding issues, because a number of issues remain to be settled. These issues include: measures that can be taken against a MAI signatory country that does not comply with a MAI panel verdict; how to distinguish between the European Commission or a member state should the subject of Europe-related complaints arise; and how to treat investment screening procedures which member governments have

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[25]Ibid., p. 14.

[26]Ibid., p. 14.

[27]Fast track procedures are part of an understanding between the executive and legislative branches, whereby the Administration agrees to consult closely with Congress during trade negotiations, and Congress agrees to a definite yes-or-no vote without amendments. For additional information, see: CRS Report 97-876, *Fast-Track Authority: Debate Over the President's Proposal*, by George Holliday, and CRS Report 97-885, *Fast-Track Legislative Procedures for Trade Agreements: The Great Debate of 1991*, by Lenore Sek.

in place, and their relationship to an investor's right to take a government to dispute settlement prior to the establishment of an investment.[28] The U.S. negotiators reportedly want to ensure that investors cannot challenge decisions by regulatory authorities. A clear majority of OECD members also favor excluding matters of taxation from the agreement, except for provisions which bar expropriatory taxes, and rules on transparency. Another outstanding issue is the number and types of exceptions members will be allowed to take from the MAI disciplines.[29] U.S. negotiators are pushing to allow only those exceptions which are based on specific government laws and regulations, while European countries lean towards exceptions for entire sectors of their economies.[30]

Although the negotiations framing the terms of the MAI have not yet been extensively scrutinized by the American public or by most of the Members of Congress, the issue is attracting a fair measure of supporters and critics. For their part, supporters argue that reducing foreign barriers to U.S. direct investment aids U.S. consumers and U.S. workers by lowering the price of internationally traded goods and by raising the U.S. standard of living. Most of these benefits arise from the greater efficiencies firms gain through a more efficient allocation of capital throughout the world.

Critics acknowledge the gains in efficiency which result from greater foreign investment, but argue that these gains are achieved at a high cost. In particular, they argue that foreign investment has contributed to the growth in disparities in wealth and income between the richest and poorest groups within the United States and between the richest and poorest nations. Furthermore, these critics contend that foreign investment increases the mobility of transnational corporations, which allows them to play countries and localities against each other, bidding down wages and other labor standards. In addition, they argue that this global competition weakens environmental standards, workplace safety rules and similar safeguards. By adopting an MAI, these critics state, governments would be restricted in their ability to shape domestic investment policies to promote social, economic, and environmental goals and would create a whole set of rights for multinational firms that would require governments to defend even when those rights conflicted with the rights, needs, or interests of individual nations and their citizens.[31]

Implications for the United States

There are benefits as well as costs for the United States in an international investment agreement. On the positive side, a mutually agreed upon set of rules

[28]U.S. Pressing to Delay Conclusion of OECD Investment Pact to May 1998. Inside U.S. Trade, April 4, 1997.

[29]Larson Hints at Possible Delay in Finalizing OECD Investment Pact. Inside U.S. Trade, March 14, 1997. p. 12.

[30]U.S. Pressing to Delay Conclusion...,

[31]For additional information, see the following sites on the World Wide Web: [http://www.citizen.org] and [http://www.rtk.net/preamble].

would reduce some of the confusion and uncertainty U.S. firms face as they invest overseas. Also, as the world's largest overseas investor, the United States, and U.S. firms, likely stands to gain the most. Such an agreement likely would help U.S. firms that are investing in both developed and developing countries and would aid them in gaining access to export markets abroad. While these actions are not likely to boost U.S. employment, they might help sustain, or enhance, U.S. wages and incomes. Fewer restrictions on international direct investment could also add to U.S. incomes by allowing for a more efficient allocation of resources among nations.

On the negative side, an international investment agreement ultimately could stalemate further progress towards reducing national restrictions and controls. In essence, a MAI may act to set a status quo that becomes entrenched in practice and less subject to change than the present situation. An agreement among the developed countries also could add to tensions between the developed and the developing economies. Such an agreement could alienate many of the developing countries who see an investment agreement as a protective measure established by the richest economies (the OECD members) to preserve their economic status relative to the developing economies by limiting the amount of investment that flows to those economies.

U.S. negotiators also have to consider how the Clinton Administration will approach the MAI issue with the Congress. The Administration has indicated that it will send the agreement to the Senate for approval as a treaty, but growing dissatisfaction among U.S. negotiators over the numbers and extent of exceptions the Europeans and Canadians are requesting coupled with public unease at home augurs poorly for consideration of the agreement during the present legislative session. The Administration would also be leery of broaching the issue with Congress until other, higher priority, trade issues have been resolved. Congress may also consider the impact a MAI will have on state and local governments. The other nations participating in the MAI negotiations expect that the provisions of the agreement will apply not only at the U.S. federal level, but at the sub-federal, or state and local, level as well. At the very least, this likely will require the cooperation of the non-federal levels of government.[32] It also is unclear how many exceptions U.S. negotiators will request for such state and local government programs as minority set-aside programs and local economic development programs.

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[32]A similar issue was confronted when the United States and the European Union reached a bilateral agreement on public procurement, which required the compliance of the state and local governments. See: Cooney, Stephen. American Industry and the New European Union. National Association of Manufacturers, Washington, 1994. p. 123.

Table A1. OECD Countries Direct Investment Position Abroad, 1994
(in millions of US dollars)

Country	**TOTAL**	*OECD*	*EC*	*Other Europe*	*North America*	*Other OECD*	*Non-OECD*
Australia	34,964	28,986	15,180	0	7,890	5,419	5,978
Austria	9,016	6,572	3,929	1,173	630	39	2,444
Belg.-Lux.	44,635	38,184	26,239	(234)	1,924	231	6,451
Canada	96,217	76,983	19,317	1,825	50,406	5,435	19,234
Denmark	16,258	15,418	8,329	4,040	2,741	311	839
Finland	11,381	10,154	5,428	2,462	2,350	139	1,228
France	157,018	133,870	87,993	10,584	32,723	2,570	23,148
Germany	203,202	178,479	102,715	20,327	46,765	8,671	24,724
Iceland	143	130	60	1	65	4	13
Italy	82	70	52	8	8	3	12
Japan	463,606	319,773	83,786	4,681	202,690	28,616	143,833
Netherlands	144,436	122,866	66,326	13,421	40,677	2,442	21,570
Norway	16,907	15,575	9,737	3,061	2,673	174	1,341
Sweden	57,284	45,101	33,048	5,443	7,517	0	12,182
Switzerland	108,377	86,171	49,160	4,614	26,514	5,884	22,206
U.K.	270,085	216,512	93,850	8,719	92,646	21,295	53,574
U.S.	621,044	456,659	261,137	43,543	74,987	76,992	164,385
Total	2,254,656	1,751,502	866,286	123,668	593,206	158,226	503,162
Country	*Africa*	*Centr. Europe*	*Latin America*	*Middle East*	*Oceania*	*Asia*	--
Australia	0	0	877	0	0	3,045	--
Austria	6	2,787	182	0	0	95	--
Belg.-Lux.	(41)	785	5,048	(38)	0	317	--
Canada	322	0	12,370	794	0	5,748	--
Denmark	36	142	149	(4)	0	359	--
Finland	11	158	230	0	0	180	--
France	667	602	4,108	752	0	3,073	--
Germany	2,299	4,718	10,881	311	0	9,744	--
Iceland	0	2	4	0	0	0	--
Italy	2	1	5	1	0	1	--
Japan	7,697	765	52,284	4,736	1,911	76,219	--
Netherlands	1,189	1,049	10,732	1,174	0	7,383	--
Norway	220	45	586	89	0	401	--
Sweden	0	0	0	0	0	0	--
Switzerland	1,508	820	15,103	359	0	4,161	--
U.K.	7,620	646	22,816	970	1,090	19,398	--
U.S.	5,530	4,270	96,512	6,794		47,876	--
Total	27,067	16,789	231,887	15,936	3,001	177,999	--

Source: *International Direct Investment Statistics Yearbook 1996*. Paris, Organization for Economic Cooperation and Development. 1996. Table 8, various countries.

Table A2. Multilateral, Regional, and Other Agreements on Overseas Investment

Instrument	Date
Multilateral Agreements	
Code of Liberalization of Capital Movements (OECD)	1961
Code of Liberalization of Current Invisible Operation (OECD)	1961
Declaration on Investment and Multinational Enterprises (OECD)	1976
Agreement on Promotion, Protection and Guarantee of Investment among the Member States of the Organization of the Islamic Conference	1981
Fourth ACP-EEC Convention of Lome	1989
APEC Non-binding Investment Principles	1994
Final Act of the European Energy Charter Conference, the Energy Charter Treaty, Decisions with Respect to the Energy and Annexes to the Energy Charter Treaty	1994
Multi-Country or Regional Agreements	
Treaty Establishing the European Community	1957
Agreement on Arab Economic Unity	1957
Agreement on Andean Subregional Integration	1969
Treaty Establishing the Caribbean Community	1973
Treaty Establishing the Latin American Integration Association	1980
Treaty Establishing the Economic Community of Central African States	1983
North American Free Trade Agreement	1992
Treaty Establishing the Common Market for Eastern and Southern Africa	1993
Other Agreements	
Common Convention on Investments in the States of the Customs and Economic Union of Central Africa	1965
Agreement on Investment and Free Movement of Arab Capital among Arab Countries	1970
Decision No. 24 of the Commission of the Cartagena Agreement	1970
Convention Establishing the Inter-Arab Investment Guarantee Corporation	1971
Joint Convention on the Freedom of Movement of Persons and the Right of Establishment in Central African Customs and Economic Union	1972
Agreement on the Harmonization of Fiscal Incentives to Industry	1973
The Multinational Companies Code in the Custom and Economic Union of Central Africa	1975
Unified Agreement for the Investment of Arab Capital in the Arab States	1980
Community Investment Code of the Economic Community of the Great Lakes Countries	1987
Agreement for the Establishment of a Regime for CARICOM Enterprises	1987
Revised Basic Agreement on ASEAN Industrial Joint Enterprises	1987
Agreement Among the Governments of Brunei Darussalam, the R Republic of Indonesia, Malaysia, the Republic of the Phillipines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investment	1987 *continued*

Instrument	**Date**
Charter on a Regime of Multinational Industrial Enterprises (MIEs) in the Preferential Trade Area for Eastern and Southern African States	1990
Decision No. 291 of the Commission of the Cartegena Agreement	1991
Decision No. 292 of the Commission of the Cartegena Agreement	1991
Colona Protocol on Promotion and Reciprocal Protection of Investment within MERCOSUR	1994
Protocol on Promotion and Protection of Investments Coming from States non Parties to MERCOSUR	1994

Source: *Annual Report 1996*. Geneva, World Trade Organization, 1996. pp. 64-65.