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The Multilateral Agreement on Investment: A Brief Analysis of the Current Status

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Summary

The Multilateral Agreement on Investment, or the MAI, was expected to be a comprehensive agreement when it was negotiated by ministers from the most economically developed countries in the world, the Organization for Economic Cooperation and Development (the OECD). The Agreement would have established an international set of rules on foreign investment.[1] Dissatisfaction with a number of provisions in the Agreement sparked intense opposition among various non-government organizations and in April 1998 spurred ministers from the United States and elsewhere to postpone additional discussions on the Agreement. France withdrew from the negotiations in October 1998, and the OECD Ministers announced on December 3, 1998, that the OECD had ceased all negotiations on the agreement. At a September 20, 1999 OECD conference on investment policy, representatives from developed and developing countries sparred over the prospects of a new round of investment talks, perhaps at the World Trade Organization's ministerial meeting in Seattle November 30, 1999-December 3, 1999. This report will be updated as events require.

Overview

The United States is the largest investor abroad and the largest recipient of foreign investment in the world. As a result, it potentially has the most to gain, or the most to lose, from international investment agreements, depending on one's point of view. In the case of the MAI, there have been two quite distinct points of view. One group has viewed the MAI as a milestone development in international investment, while another group has characterized the MAI as an ill-conceived agreement that could have undermined national sovereignty and degraded workers' rights. This contrary viewpoint also argued that an

[1] For additional information, see: CRS Report 97-469, *Multilateral Agreement on Investment: Implications for the United States*, by James K. Jackson; and the MAI Internet address: [http://www.oecd.org/daf/cmis/mai/maindex.htm].

international investment agreement ultimately could have reduced national standards affecting the environment and could have handed international corporations a largely unchecked influence over international economic developments.

Beginning in May 1995, OECD ministers negotiated over various principles of international investment that eventually comprised the MAI. The OECD ministers were attempting to build on the existing legal regime to create a strong and comprehensive international legal framework that could have reduced restrictions on foreign investment and expanded opportunities for firms seeking to invest abroad. This agreement was intended to be a stand-alone agreement and to be accessible to any country, developed, or developing, that would have been willing to abide by its precepts. OECD members also sought to reduce barriers and discriminatory treatment of foreign direct investment and to increase the legal security for investments and investors. To give this agreement some teeth, the MAI was intended to be legally binding and to contain provisions for settling disputes.

As a whole, the OECD favors eliminating most of the national rules governing inward and outward direct investment, although OECD members want to retain exemptions for industries or sectors that individual countries deem to be important to their national security or of special national importance. Most OECD countries, including the United States, favor excluding some economic sectors from the standards of international investment agreements, although the United States wants the number of such exclusions kept small and the vast majority of sectors left open and accorded national, or unbiased, treatment.[2]

Existing Arrangements

The MAI would not have been the only international accord on foreign investment. Multilateral and bilateral agreements date back to at least the 1960s. At the multilateral, or multi-nation, level, there are various arrangements the United States and other countries use to protect their investments abroad. One type of arrangement is characterized by the treaties establishing the European Community and the North American Free Trade Agreement (NAFTA). A second type of arrangement covers only foreign investment. This group includes the OECD Code of Liberalization of Capital Movements and the Code of Liberalization of Current Invisible Operations. Aside from these arrangements, the OECD has issued two basic statements on foreign investment, The Declaration on International Investment and Multinational Enterprises and the OECD Guidelines for Multinational Enterprises.

The United States has also signed a large number of bilateral Friendship, Commerce, and Navigation treaties and bilateral, or nation-to-nation, investment treaties.[3] Bilateral investment treaties generally are established on the principles of most-favored-nation (MFN), or non-discriminatory, treatment and national treatment for both the admission

[2] OECD Investment Agreement Unlikely To Include Major Liberalization. *Inside U.S. Trade*, January 23, 1998, p. 1.

[3] For additional information, see: CRS Report 98-39, *Foreign Investment Treaties: Impact on Direct Investment*, by James K. Jackson.

and the subsequent treatment of investments, but they include exceptions for industries or areas that are reserved for national security, or for other national objectives.

Scope of the MAI

Despite various multilateral and bilateral arrangements, the Administration has supported the concept of a new comprehensive investment agreement because not all of these investment treaties contain provisions for settling disputes. Moreover, U.S. and other multinational firms still encounter barriers, discriminatory treatment, and legal and regulatory uncertainties abroad, despite the general trend toward reducing national restrictions on foreign investment. Also, the lack of a comprehensive agreement on investment means that investors face different legal regimes across borders, which increases investors' uncertainties and hampers the flow of investment funds. Some negotiators also apparently believed the MAI could have spurred the development of an up-to-date set of international rules that was intended to build on and reform the existing set of international principles.

Unresolved Issues

Over the course of their negotiations on the MAI, OECD Ministers grew increasingly divided over various provisions, which ultimately undermined the negotiations. Citizen and consumer groups also raised a chorus of concerns over various provisions in the draft MAI agreement and used the rapidly expanding communications afforded by the Internet to band together and to persuade key negotiators and legislators in Canada, the United States, France, and other countries in Europe to back away from the draft agreement. Political involvement by non-government groups, or NGOs, in international economic issues is not unprecedented, although their opposition to the MAI seems to have been particularly intense. In part, this opposition was driven by concerns over the increased trade and financial ties that are developing among nations, or the phenomenon of globalization. Also, since a number of international trade agreements, including the World Trade Organization (WTO) and the NAFTA, incorporate such issues as intellectual property rights, services, and investments, some of the NGOs argued that the wall has been breached to address consumer-oriented issues as well in international negotiations.

OECD members remained divided over a number of other provisions of the Agreement that undermined prospects for a settlement. Issues of greatest concern involved technical legal questions, and only indirectly involved economic issues of the perceived costs and benefits of joining an international agreement on investment. Within the United States, U.S. negotiators backed away from the draft MAI agreement for a number of reasons, including: uncertainty over the impact the dispute resolution process and the definition of "national treatment" would have had on state and local governments, and concern over the way the MAI would have incorporated the Helms-Burton Act, which prohibits investing in expropriated property.[4]

National Treatment. One objective the negotiators had in drafting the MAI was to create a legal regime that would provide similar and fair treatment for investors across national borders. As a result, the MAI would have required the signatory countries to

[4] US Still Engaged in MAI Exercise. *Washington Trade Daily*, March 6, 1998, p. 3.

apply "national treatment" and MFN treatment, similar to the fundamental obligations nations adhere to in bilateral investment treaties and in such treaties as NAFTA. Within the context of the MAI, the definitions of national treatment and MFN treatment are that: the parties to the MAI will treat foreign investors no less favorably than they treat their own investors (national treatment); and the parties will not discriminate among the investors or investments of different MAI parties (MFN treatment).[5] Some critics argued that this definition harbored vast numbers of potential legal problems for state and local governments which could have faced suits from foreign firms that object to state consumer and environmental legislation and nation-to-nation disputes that involve economic sanctions. Some critics contended that applying the standard of national treatment would have challenged the current practice by state and local governments of discriminating between firms based on their environmental, labor, and other corporate practices, thereby sharply curtailing the ability of these jurisdictions to exercise control over events within their own borders. These and similar consumer concerns gained wide-spread exposure through the Internet and coalesced around a lobby of non-government organizations against the Agreement. Opponents' concerns appeared to be heightened by the perception that the Agreement was being negotiated in "secret," although nation-to-nation trade and investment agreements often are negotiated behind closed doors until the agreement is submitted to Congress.

Dispute Resolution. Dispute resolution procedures in the Agreement raised concern among some U.S. critics of the MAI. According to the draft MAI agreement, the dispute resolution process would have covered both government-government and investor-government disputes. While nearly all parties recognize the need for an established legal process to resolve state-state disputes, opinions are fragmented and contradictory over the need, advisability, and legal implications of adopting a formal process to resolve investor-state disputes. For instance, some critics argued that the dispute resolution process protected the rights of multinational firms, but offered no protection, or even a role for, consumers and citizens. They believed the MAI process could have forced state and local governments to face firms in legal proceedings in unfriendly international arbitral tribunals over state set-aside programs for minority groups or targeted economic programs, or even over zoning changes which could be challenged as "expropriation."

Although some critics disagreed with the procedures outlined in the MAI draft for resolving disputes, many of the methods are currently in use. For one, the MAI encouraged the parties involved in a dispute to settle the dispute by negotiation or consultation. If this approached failed, an investor could have sought a resolution by referring to: "any competent courts or tribunals of the Contracting Party"; "in accordance with any dispute settlement process agreed upon prior to the dispute arising";[6] or by arbitration under the ICSID[7] (International Convention on the Settlement of Investment

[5] Definitions are taken from the MAI site on the World Wide Web: www.oecd.org/daf/cmis/mai/faqmai.htm. A copy of a draft version of the MAI agreement is available at: [http://www.dfait-maeci.ga.ca/english/trade/may_1997-e.htm].

[6] *Multilateral Agreement on Investment: Consolidated Text*, p. 65.

[7] ICSID was created in 1966 specifically to facilitate the settlement of investment disputes between governments and foreign investors. It is an autonomous international organization, but it operates under the auspices of the World Bank. By agreeing to ICSID arbitration, investors cannot bring

(continued...)

Disputes) Convention, the UNCITRAL[8] (United Nations Commission on International Trade Law) rules of arbitration, or the International Chamber of Commerce Rules of Arbitration.[9]

National Exceptions. A major sticking point between the United States and European members was the number and types of exceptions other OECD members were requesting from the Agreement.[10] U.S. negotiators pushed to allow only those exceptions which are based on specific government laws and regulations, while European countries leaned towards exceptions for entire sectors of their economies.[11] The European Commission pressed for an exemption for regional economic integration organizations (REIO) that would have allowed European Union (EU) governments to retain preferential treatment for other EU members if the policies had been part of the EU's integration program. In turn, the United States requested an exemption for government procurement policies and for subsidies.

Canada and France also requested broad exemptions for cultural issues. This stance, in particular, caused other OECD members to believe the agreement that was emerging was a retreat from, rather than an improvement on, the current system. Canada and some of the EU members wanted the whole issue of investment taken up by the WTO, rather than by the OECD, so that developing countries could participate fully in the negotiations. U.S. negotiators opposed this move, because they believe that it would have reopened the Agreement for negotiation, thereby jeopardizing agreements reached at that point, and that it would have placed the Agreement in the even more unwieldy WTO (where it likely is now headed), where disagreements between developed and developing countries would have added to the unresolved issues between the developed countries.[12]

Extraterritoriality, or The Helms-Burton Act. Some opponents of the MAI expressed concern that the Agreement would have allowed foreigners to challenge U.S. foreign policy goals that rely on economic sanctions. In particular, they argued that the MAI could have prevented the United States from adopting such legislation as the Cuban Liberty and Democratic Solidarity Act of 1996 (P.L. 104-114), commonly referred as the

[7] (...continued)
suit against a government in a non-ICSID forum. For additional information, see the ICSID site on the World Wide Web at: [http://www.worldbank.org/].

[8] UNCITRAL was created in 1966 to harmonize and unify the law on international trade and has come to form the core legal body of the United Nations on international trade law. For information, see the World Wide Web site: [http://www.un.or.at/uncitral/].

[9] The International Court of Arbitration of the International Chamber of Commerce was created in 1923 and pioneered much of what currently is known as international commercial arbitration. In 1997, 452 new requests for arbitration were filed with the ICC, concerning 1,290 parties from over 100 different countries. For information see the World Wide Web site: [http://www.iccwbo.org/].

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

[11] U.S. Pressing To Delay Conclusion of OECD Investment Pact to May 1998. *Inside U.S. Trade*, April 4, 1997, p. 7.

[12] MAI Down but not Out. *The Globe and Mail*, May 19, 1998. From Internet address: [http://www.theglobeandmail.com/].

Helms-Burton Act after the law's two major sponsors. The Helms-Burton Act includes a provision that holds liable for monetary damages in U.S. federal court any person or government that traffics in U.S. property confiscated by the Cuban government. (The right to sue under this provision, however, has been suspended.) The law also bans foreign executives from the United States if their companies traffic in expropriated former U.S. property in Cuba. Canada and European Union members strongly oppose the law because they believe it is an extraterritorial application of U.S. law.

In late May, the United States and the European Union announced that they had reached an agreement on the Helms-Burton Act.[13] Under the terms of the agreement, the Administration reportedly will submit a legislative proposal to Congress that would amend the Helms-Burton Act to allow the President, at his discretion, to grant waivers to the Act to EU members who have signed onto expropriation guidelines that would have been attached to the MAI. In return, the EU signatories would deter new investments in illegally expropriated properties around the world. The two sides agreed to set up an international registry of cases of expropriation, including the nearly 4,000 cases of expropriation in Cuba.

Conclusions

The MAI likely would have offered both costs and benefits. On the benefit side, an internationally agreed upon set of investment rules potentially could reduce some of the confusion and uncertainty U.S. firms face as they invest overseas. 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 markets abroad. While these actions likely will not boost U.S. employment in the short run, they may help sustain, or even enhance, U.S. wages and incomes.

On the cost side, an international investment agreement could stalemate further progress toward reducing national restrictions and controls by setting in place a status quo that could become entrenched in practice and less subject to change than the present situation. An investment agreement among the developed countries could further add to existing tensions between the developed and the developing economies over foreign investment. Many of the developing countries often view international investment agreements as protective measures 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. Furthermore, domestically, states and localities might face a set of requirements that they are unwilling to assume, which could lead to the defeat of an agreement. These issues likely will surface more fully if the WTO addresses, as expected in the year 2000, the issue of an international investment agreement.

[13] Administration To Offer Helms-Burton Change Soon. *Washington Trade Daily*, June 2, 1998, p. 3.