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Introduction

This Article reproduces a presentation made at the Cornell Law School Symposium on March 6, 1998. It discusses the significance of the Multilateral Agreement on Investment (MAI). Specifically, the Article explains (1) the importance of the MAI to the United States, (2) why the Organisation for Economic Co-operation and Development (OECD) is hosting the MAI negotiations, and (3) the key issues under discussion among MAI negotiators. The Article intends to place the MAI negotiations in a broader context.[1]

I. Why is the MAI Important?

Foreign investment makes a crucial and growing contribution to the prosperity of the United States. In 1996, the flow of foreign direct investment into the United States reached $78.8 billion while outflows reached $85.6 billion – larger than any other country.[2]

In a global economy, U.S. firms need a worldwide presence to succeed. For example, service industries, which accounted for $277.1 billion in exports in 1997,[3] require a physical presence in foreign markets to compete effectively. Approximately twenty-six percent of U.S. exports are channeled through foreign-based affiliates of U.S. companies.[4]

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1. Consistent with this objective, this Article provides a broad overview of issues addressed in the MAI negotiations. The author's views on the MAI negotiations and its participants derive from his own participation in the negotiations and do not purport to represent the current position of the parties themselves.

2. *See* BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS 114-15, 144-45 (Sept. 1997); U.N. CONFERENCE ON TRADE AND DEV., WORLD INVESTMENT REPORT, 1997, at 303, 308, U.N. Doc. TD/JUNCTAD/ITE/IIT/5, U.N. Sales No. 97.II.D.10 (1997).

3. *See* BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS 40, 67 (Aug. 1998).

4. *See* BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS 50, table 4 (Oct. 1997) (1995 figure).

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Foreign investment within the United States stimulates the American economy. Foreign owned companies not only employ five million American citizens,[5] but they also contribute new technologies to the U.S. economy. In addition, foreign firms generally pay higher wages than comparable U.S. companies and demonstrate greater labor productivity.

Recently, developing countries have become more receptive to foreign investment as they recognize its benefits to economic development. Private foreign investment flows now substantially outpace foreign assistance funds. The global explosion of bilateral investment treaties since the beginning of the 1990s, from 435 in 1990, to 1247 by the end of 1996, demonstrates developing countries' interest in foreign investment.[6] In addition, investment discussions in the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organization (WTO), Asia Pacific Economic Cooperation (APEC), and the Free Trade Area of the Americas (FTAA) look to the MAI as a model for multilateral rules. Similaraly, several of the transition and advanced developing economies have expressed interest in acceding to the MAI, including the five observers (Argentina, Brazil, Chile, Hong Kong, and Slovakia) and the Baltics.

II. The Importance of the MAI to the United States

The United States needs to enhance its global competitiveness by ensuring the fair treatment of its investors abroad. Furthermore, the United States must continue to maintain an open environment for foreign investment within its own borders. The primary U.S. objectives are (1) to ensure that the MAI fosters global efforts to protect the environment, (2) to respect internationally recognized core labor standards, and (3) to achieve sustainable development.

The principle of non-discrimination underlies the MAI. This is apparent from the basic architecture of the MAI, which follows the familiar lines of the forty-two bilateral investment treaties (BITs) that the United States negotiated during the last two decades, as well as the investment chapter of the North American Free Trade Agreement (NAFTA). The United States seeks to improve this framework wherever possible. The MAI's primary features will include:

- non-discrimination policies regarding U.S. investment abroad and the application of these principles to U.S. investors seeking to establish a presence in a foreign market;
- freedom to conduct investment-related transfers, including transfers of profits, capital, royalties, and fees, whether into or out of the country where the investment takes place;
- international legal standards for expropriation and compensation consistent with U.S. legal principles and practice;

5. *See* BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS 39 (June 1998).

6. *See* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, BILATERAL INVESTMENT TREATIES 1959-1996, at 1-96 (1997).

- disciplines on performance requirements including trade and foreign exchange balancing requirements that create trade and investment distortions; and
- compulsory international dispute settlement procedures, including international arbitration for disputes between nations and individual investors when the investors can establish that a violation of the agreement caused them to suffer a specific harm.

III. Why OECD is Hosting the MAI Negotiations

Twenty-nine advanced countries in Europe, Asia, and North America comprise the OECD. These countries include the largest sources of, and the largest destinations for, foreign investment. The OECD has a long track record of dealing with investment issues, as well as social and environmental problems. The members of the OECD generally possess high labor standards and good records on environmental protection. These factors result in a commonality of values not reflected in wider fora, such as the WTO. These common principles afford the United States an opportunity to secure an investment agreement that meets both its investment and social policy objectives.

The OECD countries must participate to establish successful multilateral rules. Other countries will likely view the MAI as an opportunity to demonstrate their readiness to meet high standards and to position themselves to attract capital in a manner that is sensitive to labor and environmental interests. Many developing economies follow the negotiations. Some have indicated a strong interest in becoming charter members. Argentina, Brazil, Chile, Hong Kong, Slovakia, Latvia, Estonia, and Lithuania are all observers to the MAI negotiations.

IV. What Are the Key Issues Under Discussion?

A. Carve-Outs and Exceptions

The United States insists that the MAI will result in a satisfactory balance of commitments and meaningful improvements in U.S. firms' access to foreign markets. Presently, the United States remains unsatisfied with the commitments on the table. Some of the U.S. partners seek ambiguous and sweeping carve-outs, including a proposal by the EU for a carve-out for "Regional Economic Integration Organizations" and proposals by several countries for a general "cultural industries" carve-out. The United States also objects to country specific-exceptions requested by many of its negotiating partners.

In addition, the U.S. delegation argues that the provisions of the MAI cannot interfere with the normal, non-discriminatory regulatory activities in areas such as health, safety and the environment. In particular, the United States desires to ensure that the expropriation article of the MAI contains no clause authorizing "inappropriate" challenges to sovereign regulatory decisions. Other countries, initially skeptical of U.S. concerns, have become more receptive and support this objective.

Furthermore, the United States is determined to protect existing measures where, for policy reasons, it wishes to reserve the right to deviate from MAI commitments. For example, the United States has strongly supported a general exception for measures deemed necessary to protect vital national security interests. Specifically, the United States tabled exceptions to specific obligations for all existing non-conforming measures at the state and local level. In addition, the United States proposed other exceptions consistent with NAFTA and bilateral investment treaties (BITs). The United States preserved its freedom to maneuver in areas such as programs to support minorities. Moreover, the United States also proposed an exception for subsidies and government procurement programs that would protect future and existing programs that discriminate against foreign investors.

B. Dispute Settlement

Similar to BITs involving the United States and the investment chapter of NAFTA, the MAI will include provisions for state-to-state and investor-to-state dispute settlement. Dispute settlement provisions provide an important tool of last resort for U.S. businesses, especially in countries with lackluster legal protections and court systems.

The United States possesses strong constitutional protections and an effective court system that provides important protections for foreign investors. The predictability and reliability of the U.S. legal system is a strong incentive for investors to rely on the protections U.S. law affords, rather than international arbitration. Indeed, no investment dispute arbitrations occurred within any jurisdiction of the United States, either under U.S. BITs or the investment chapter of NAFTA.

C. Environmental Protection and Labor Standards

A well-designed MAI possesses the potential to advance U.S. aims regarding environmental protection and internationally recognized core labor standards. The OECD Secretariat assembled considerable evidence suggesting that foreign investment favorably affects environmental protections and labor standards abroad. Many U.S. companies "export" their high standards when they operate abroad. In fact, OECD nations have developed one of the few multilateral codes for business, which include both labor and environmental provisions. The MAI will use these Guidelines for Multinational Enterprise.

The United States proposed a series of measures to strengthen MAI environmental provisions. Patterned on NAFTA,[7] these proposals include provisions on health, safety, and the environment. For example, these measures include the right of each party to establish its own levels of domestic environmental protection and encourage environmental impact assessments for proposed investments involving a governmental action.

7. *See* North American Free Trade Agreement, Dec. 17, 1992, U.S.-Mex.-Can., art. 1114, 32 I.L.M. 605, 642 (entered into force Jan. 1, 1994) [hereinafter NAFTA].

These provisions affirm the legitimacy of such regulations, provided that they are consistent with the agreement.

The United States also focused on provisions that affect U.S. workers. In addition to the OECD Guidelines on Multinational Enterprises, the United States seeks support for internationally-recognized core labor standards.

Agreement exists that the parties should not engage in a "race to the bottom" by lowering their health, safety, and environmental standards, nor should they retreat from supporting internationally recognized core labor standards in order to attract investment. OECD countries, however, broadly share U.S. values in these areas; the OECD maintains a long tradition of dealing with environmental and labor concerns.

In order to ensure that non-OECD countries meet basic environmental and labor standards, the United States has suggested the possibility of "readiness criteria" to measure the ability of potential new members to meet basic commitments.[8] On the margins of the MAI negotiations, the United States is cooperating with the Europeans on disciplines that deter investment in property expropriated inconsistent with the requirements of international law.[9] Additionally, the United States seeks agreement on a general set of global disciplines that also would apply to expropriated American property in Cuba.

D. Right to Regulation

The United States also proposed language to preserve America's general right to regulate. One such example is a proposal that clarifies why nations must evaluate questions of national and most-favored-nation treatment by comparing investors or investments that are "in like circumstances."[10] The United States proposed additional language on transparency to provide for the verification of information in order to ensure compliance with a party's laws and regulations.

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8. *See* Understanding between the United States and the European Union (Apr. 14, 1997) (document on file with author) (addressing issues under the Libertad Act and the Iran and Libya Sanction Act (ILSA)).

9. *Id.* The discussion flows out of the April 11, 1997 understanding concluded by Ambassador Eizenstat and EU Commission Sir Leon Brittan.

10. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), PACKAGE OF ADDITIONAL U.S. ENVIRONMENTAL PROPOSALS TO THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, MULTILATERAL AGREEMENT ON INVESTMENT (Jan. 1998) (document on file with author). The proposal language reads as follows:

> "In like circumstances" ensures that comparisons are made between investors and investment on the basis of characteristics that are relevant for the purposes of the comparison. The objective is to permit the consideration of all relevant circumstances, including those relating to a foreign investor and its investment, in deciding to which domestic or third country investors and investments they should appropriately be compared, while excluding from consideration those characteristics that are not germane to such a comparison.

V. When Are the Negotiations Likely to Conclude?

Accuracy must trump alacrity in the MAI negotiations. At a recent meeting of the parties, Ambassadors Eizenstat and Lang made clear the U.S. view that it will not conclude any agreement, let alone the high quality agreement it seeks, in time for the OECD Ministerial in April.[11] Reaching a high quality agreement will require hard work in narrowing proposed carve-outs, careful attention to regulatory issues, and real dialogue with interested constituencies. Success is not assured. The benefits of success, however, leave little doubt that the United States should embrace the challenge.

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11. *See* Stuart Eizenstat, Under Secretary of State, and Jeffrey Lang, Deputy U.S. Trade Representative, *Statement on the Multilateral Agreement on Investment* (Feb. 17, 1998) (document on file with author).