

## THE MULTILATERAL AGREEMENT ON INVESTMENT (MAI): Leveling the Playing Field for Foreign Investment

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Over the past decade, Foreign Direct Investment (FDI) has combined with international trade to play an increasingly important role in the global economy. According to a report by the WTO Secretariat on Trade and Foreign Direct Investment, the annual outflows of FDI increased from \$25 billion in 1973 to some \$315 billion in 1995, for an accumulated FDI total of some \$3 trillion. Intra-firm trade among multi-national corporations (MNCs) is estimated to account for about one-third of world trade, and MNC exports to all other firms for another third. Overseas expansion is now being viewed as a necessity rather than as a luxury. This is particularly the case in the OECD countries, which accounted for some 90 percent of global direct outflows and about 65 percent of global inflows in 1995.

### *The Need for a Multilateral Agreement*

With this growing importance of FDI has also come an increasing recognition of the need for a broad multilateral agreement on investment. Negotiations on a Multilateral Agreement on Investment (MAI) began two years ago in the OECD to bring together the current patchwork of bilateral and regional investment treaties into a single agreement protecting foreign investors rights.

The MAI is to be a comprehensive agreement covering all forms of investment coming from MAI investors, including the establishment of enterprises and the activities of estab-

lished foreign-owned or controlled enterprise. It extends beyond traditional foreign direct investment to encompass portfolio investment and intangible assets. Further work is focusing on intellectual property rights, indirect investment, concessions, public debt and real estate.

Broad obligations on national treatment and most favored nation treatment (MFN) are central elements of the MAI. De jure and de facto discrimination against foreign investors and their investments are covered, although more work is needed on de facto discrimination. National treatment and MFN apply to all investment phases with scope for lodging country specific reservations.

Texts are being considered concerning the entry, stay and work of investors and key personnel, the participation of foreign investors in privatization activities, investment incentives, a prohibition against certain performance requirements imposed on investors, and a prohibition of nationality requirements for senior management positions. Delegations are discussing how to treat issues relating to monopolies, concessions, and state enterprises. There are also intensive discussions concerning environment, labor standards, and taxation, but much less consensus and progress.

The MAI aims to provide high standards of investment protection based on bilateral investment treaties. Texts have been developed on the general treatment of investors and investments, expropriation, protection from strife, transfer of funds, subrogation and the protection of existing investments.

The agreement will encourage the resolution

of disputes through negotiation or consultation among the parties concerned. Where investment disputes covered by the MAI cannot be settled amicably, detailed procedures have been worked out which allow submission of the dispute for binding investor-to-state or state-to-state dispute settlement.

Final agreement will depend on achieving a satisfactory scope and balance of commitments among the negotiating parties, including agreement on the text, exceptions and safeguards, and country specific reservations.

The MAI is to be a free standing treaty, open to accession by non-member countries who are willing and able to meet its obligations. Considerable effort has been made to inform non-members and to provide first-hand opportunities for discussions as the MAI negotiations have progressed.

### *Not All Roses*

The MAI has lately been the focus of some strong criticism. The most vocal critics have mainly been groups representing nationalists, third-world parties, environmentalists, labor, and welfare groups, among others. They argue that MNCs gain almost unlimited rights without assuming the usual responsibilities or obligations.

More specifically, they argue that:

-The MAI makes it easier, perhaps too easy, for investors to move assets across borders. This could hasten job flight from industrialized countries and make it easier for firms to move or close down facilities after only grabbing profits without contributing to local development. The increased mobility could also cause pressure to compete for investment capital by lowering wages and labor, environmental and consumer-safety standards, speeding up the international "race-to-the-bottom."

-The MAI could prevent countries from restricting limits on what foreign investors can own or from imposing any obligations. No performance requirements could mean that living wage laws or health or safety or public safety laws could be challenged as being biased against foreign businesses, and thereby undermine progress being made in these areas.

-The MAI could hinder or weaken efforts to target economic development at certain industries, local areas or minorities. Any programs providing funds or aid for priority industries, local areas, underdeveloped communities, small and/or minority-owned businesses, and others could be challenged as being discriminatory against foreign businesses.

-The MAI allows firms to directly challenge national governments, thus giving them virtual-"nation-state" status. The MAI allows corporations to sue governments to enforce any and every MAI provision, but no forum is provided for governments, communities and individuals to sue MNCs in return.

### *The Future of the MAI*

While the draft text has been basically agreed upon, it still remains to be seen when the agreement will be completed and what exceptions will be given to whom. That in itself makes it difficult to predict what kind of impact the MAI will have, but the bigger issue seems to be whether or not the concerned governments will be able to have the MAI ratified in their home legislatures, assuming it is not watered down. The opposition to the MAI is spirited and formidable, to say the least, and is found almost everywhere, from the richest and most advanced countries like the U.S. down to the poorest and least developed Third World countries. Opponents have been capitalizing on growing fears about the effects

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of globalization, making doomsday predictions of an increased disparity of wealth and income, the growth of national and global monopolies, and a loss of democratic control on a wide range of policies. The nightmare they conjure up most often is MNCs running amok around the globe in search of the greatest profit, accountable to no one, and screwing over labor, the environment, local communities and even governments in the process.

One of the major keys seems to be the U.S. Once completed, the MAI will be introduced in the U.S. Congress either as a treaty, which requires 2/3 Senate ratification, or as an executive agreement, which requires a simple majority vote in the House and Senate. Either way, the going will not be easy; already many are voicing their uncertainties about the "benefits" of globalization and liberalization as witnessed in the growing criticism of the NAFTA agreement. If the agreement is not ratified in the U.S., and also in Europe, then it goes without saying that the MAI becomes irrelevant, until it is modified or watered down enough to satisfy opponents. However, if the agreement passes in both, the rest of the OECD members will probably quickly follow suit, not to mention a number of the more developed non-OECD members. While some may feel that they might not be ready to "level the playing field," they may feel compelled to do so since non-action could put them at a comparative disadvantage in attracting highly desired foreign investment. Some may also feel disinclined to join in an agreement they did not help to negotiate, but participating will help them in discussing some of the contentious issues which remain unresolved and also the new issues which are bound to arise.

*Should We Worry?*

With all of the uncertainties surrounding the details, the reservations allowed, and who will actually join the agreement, it is difficult to assess the overall impact the MAI will have on Korea. One of the obvious winners of the MAI would be the Korean chaebol and others looking to expand their overseas investments, particularly in developing markets. The MAI would clearly remove some of the de jure and de factor investment barriers Korean firms face today, and provide them with new mechanisms to combat perceived barriers. Korea's commitment to the MAI would also improve foreign investors' outlook on Korea and thereby help Korea to attract new foreign investment and technology.

On the other hand, the liberalization of capital flows, particularly short-term capital, could cause instability in the domestic financial markets. The current account deficit would probably increase due to an increase in imports, the transfer of profits and royalty payments. In addition, foreign firms, with their often superior capital, technology and management, would be able to rapidly increase their market share and make it that much more difficult for Korean SMEs to survive.

Given the continuing globalization of the world economy, it is still in Korea's best interests to become a party to this landmark agreement, assuming it is able to negotiate its position properly and obtain exceptions in strategic issues. Much of the liberalization entailed in the MAI is already covered in Korea's other obligations to the OECD and the WTO, and the potential benefits in terms of added trade and investment could be huge. Furthermore, joining the MAI will put Korea in a much more advantageous position to negotiate on unresolved and future issues, and thereby help determine its own future. **VIP**