

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records
Subgroup/Office of Origin: Policy Development
Series/Staff Member: Jason Berman
Subseries:

OA/ID Number: 10603
FolderID:

Folder Title:
[Multilateral Agreement on Investment and Fast Track]

Stack:	Row:	Section:	Shelf:	Position:
S	100	2	3	1



MAI
Multilateral
Agreement on
Investment

United States Department of State

Washington, D.C. 20520

FAX TO
BRYAN SAMUEL
RETURN ORIGINAL

SENSITIVE BUT UNCLASSIFIED

TO: NEC - Daniel K. Tarullo
USTR - Bob Novick

FROM: EB - Alan P. Larson

SUBJECT: MAI and Fast Track

As the intensity of negotiations on both the Multilateral Agreement on Investment (MAI) and Fast Track Authority will increase in the next month, it seems an opportune time to review the issues related to inclusion or exclusion of the MAI in Fast Track.

Fast Track Legislation

7 Current thinking is that agreements already under negotiation would not be eligible for Fast Track consideration. If we want the MAI to be eligible for Fast Track, we would need either specific language citing the MAI (which would lock us into using it) or more general language that preserved the option but did not require use. In addition to factors discussed below related to MAI approval, we should think about whether an attempt to include MAI in a Fast Track bill would complicate securing passage of the overall bill. The views of Helms and other Committee chairs as well as concerns of labor and environment groups could come into play. *Yes*

Legislative Dynamics

If the MAI is submitted as a regular treaty, Committee responsibility will lie with Foreign Relations and a two-thirds majority will be required in the full Senate for approval. Helms has made it clear that he thinks this is the way to go. Not surprisingly House Ways and Means and Senate Finance would like to have a chop on the MAI, which they would get if it were submitted as a trade agreement. As a trade agreement, the MAI would need only a simple majority in both houses to be approved. *at least should be*

Need for MAI Implementing Legislation: The MAI is likely to require some implementing legislation which, regardless of the route the Agreement takes, would need approval in both the House and Senate. Three areas where we are likely to need implementing legislation are:

- addressing state concerns about dispute settlement, in conformity with NAFTA and WTO precedents (in particular, barring MAI-based suits against states in any U.S. Court);

- any disciplines on investments in properties expropriated inconsistent with international law (e.g., prohibitions on investment or denial of state aids) resulting from our talks with the E.U. regarding Helms-Burton; and
- changes to U.S. visa regulations regarding entry of key personnel. Specifically, allowing entry of nationals of any MAI party regardless of whether they have the same nationality as the investor who employs them.

The dispute settlement issue was dealt with for the NAFTA and GATT through implementing legislation and States support a similar or stronger approach. Legislation would be necessary for serious Helms-Burton related disciplines, but we would expect support from Helms and other supporters of our Cuba policy. It is possible that legislation to implement the expropriation disciplines could be incorporated in another vehicle (e.g. as part of legislation that would permit a waiver of Title IV of Helms-Burton). While it should be assumed for the present that implementing legislation will be required, its content (with the possible exception of the expropriation disciplines) is unlikely to give rise to controversy over substance.

If we believe that once the MAI gets approval, implementing legislation will not be the major hurdle, the key question becomes whether a two-thirds majority in the Senate in support of the MAI will be harder or easier to obtain than a simple majority in both the House and Senate. We can expect greater opposition to the MAI in the House, particularly in light of the vocal concerns of the labor and environmental communities. Whether that opposition would be more formidable than obtaining the two-thirds majority needed in the Senate is not clear. To address that question, we need to consider not only substantive issues related to the MAI that will surface on the Hill but the potential costs stemming from our procedural decisions. Would, for example, submitting the agreement as a trade agreement against Helms' strongly stated preferences lead to a stalemate or increased opposition in the Senate that otherwise would not materialize? Conversely, will House opponents seek to derail the MAI by fighting otherwise innocuous implementing legislation if the MAI is submitted as a treaty?

Conclusion

All things being equal, preserving our options would be the prudent course. However, if the potential complications for Fast Track are judged to be considerable and the risks posed by the potential need for implementing legislation are not too great, the Treaty route might present a smoother path. If the collective wisdom of experts agreed, we might decide not to pursue Fast Track Authority.

I recommend additional discussion among ourselves, possibly supplemented by some contacts with senior staff on their views related to both jurisdiction and substance before we make a final decision.

Drafted: EB/ODF:SDriano; EB/OIA:WScholz
7-7411
SEMAI 372
Clearance:
EB/TPP:DMarchick
L/EBC:JDonoghue

Multilateral Agreement on Investment:

Potential Effects on State & Local Government



Western Governors' Association

April 1997

PREFACE AND ACKNOWLEDGMENTS

The purpose of this report is to examine the implications for state sovereignty of what has been publically proposed for the Multilateral Agreement on Investment (MAI) and to recommend actions for governors. It is hoped that this analysis will also aid the dialogue that is taking place between the federal government and the states on the MAI, and that it helps to satisfy requests by the federal government for information from states on laws that the MAI may impact.

No Western Governors' Association (WGA) staff, WGA contractors, or western state points of contact for trade matters hold a security clearance that would allow review of confidential documents related to the MAI. As a result, this report was prepared using publically available documents and sources only. Leaked information on the MAI has not been used or inferred from for purposes of this report. Accordingly, the United States government and other MAI negotiating parties may have already addressed or agreed to address issues set forth in this paper. Nevertheless, until the MAI is finalized among the negotiating partners, made public, and adopted by the United States through Congressional implementing legislation, the issues raised herein should remain a concern for state governments.

This report was prepared by Thomas Singer and Paul Orbuch of the WGA, with the assistance of Professor Robert Stumberg, Harrison Institute for Public Law, Georgetown University Law Center. The staff of the Harrison Institute contributed substantial research and analysis of state legislation, constitutional law and international law upon which this report is based. Contributors include Institute fellows Matthew Porterfield and Gary Peck and the following research assistants and clinical interns: Beth Mantz, John Dwyer, Jennifer Daehler, Ladd Cahoon, Jennafer Smoker Vallez, Marlene Williams and Jonathan Engler.

The authors acknowledge with gratitude the work of the Harrison Institute and the helpful comments on drafts of this report provided by state and federal officials and other individuals.

Funding for the WGA International Trade Policy Program is provided by the William and Flora Hewlett Foundation and by the Charles Stewart Mott Foundation. Additional copies of this report and more information on the WGA and its International Trade Policy Program can be obtained on the WGA web site at www.westgov.org. You may contact us at Western Governors' Association, 600 17th Street, Suite 1705 South Tower, Denver, CO, 80202. Phone: (303) 623-9378; Fax: (303) 534-7309.

MULTILATERAL AGREEMENT ON INVESTMENT: POTENTIAL EFFECTS ON STATE & LOCAL GOVERNMENT

Contents

	Page
I. EXECUTIVE SUMMARY	iii
II. INTRODUCTION	1
A. The Push for Investor Protection	1
III. PROPOSALS FOR A MULTILATERAL AGREEMENT ON INVESTMENT	4
A. Investor Protection	4
B. Exceptions to the Agreement	6
C. Creating Legal Remedies	7
D. Avoiding Conflicts with Other Agreements	8
IV. POTENTIAL MAI EFFECTS ON STATE GOVERNMENTS	9
A. Economic Regulation	10
B. Land Use and Environment	12
C. Economic Development	17
D. Enforcement and State Sovereignty	21
V. ADDRESSING STATE INTERESTS IN THE MAI	24
A. The MAI Process - How the States Can Be Heard	24
B. Recommended State Actions	25
VI. CONCLUSION	27
ENDNOTES	28

I. EXECUTIVE SUMMARY

Western states have had great success in attracting foreign investment and investors based in the West own significant investments overseas. The proposed Multilateral Agreement on Investment (MAI), presently being negotiated by the world's most developed countries, is intended to foster additional investment activity, while at the same time providing stability to and leveling the playing field for U.S.-based investors.

Along with these potential benefits, however, the MAI may also have the effect of impinging on the sovereignty of state governments. The purpose of this paper is to examine the implications of MAI proposals for state sovereignty and to explore actions the governors can take to protect state interests. As explained in this paper, MAI proposals may impact law-making powers of state and local government in several areas:

- ***Limits on state policies*** which favor local businesses in the four areas that the Supreme Court has recognized as permissible: (1) laws where state interests outweigh incidental effects on out-of-state commerce, (2) direct state subsidies, (3) state government actions as a market participant rather than a market regulator, and (4) other areas of state action affecting out-of-state commerce which are authorized under existing federal legislation.
- ***Limits on investment incentives*** for economic development, pollution prevention, and recycling.
- ***Limits on performance requirements*** and measures that governments use to hold companies accountable for creating jobs or making certain investments if they receive government assistance.
- ***Limits on economic, land use, and environmental regulation***, if MAI arbitration forums find that those laws are burdensome enough to constitute an expropriation.
- ***Limits on general exceptions and country-specific reservations*** to the MAI that differ markedly from NAFTA and the Uruguay Round and that could bring many more state practices within the scope of the MAI.
- ***Enforcement proposals*** that would enable investors or their home governments to seek remedies directly against state laws through international arbitration or domestic courts and create rights that are not now available to foreign investors through American statutes or case law.

Consistent with the approach used by the states on the North American Free Trade Agreement and on the Uruguay Round of the General Agreement on Tariffs and Trade, governors are again positioned to support the MAI in principle while pushing the federal government to take steps to protect state sovereignty in the MAI and in potential implementing legislation. Among the measures that the governors should seek for the MAI are:

- ***The authority of states to discriminate in favor of state residents*** as consistent with the United States Constitution.
- ***The ability of states to use investment incentives and performance requirements*** to achieve legitimate public purposes.
- ***Exceptions and reservations in the MAI consistent with those in NAFTA*** and the Uruguay Round. All state measures that might be in conflict with the MAI should be reserved and this reservation should in addition cover future state measures.
- ***Definitions of national treatment, most-favored-nation, and expropriation*** that do not limit state authority.
- ***Implementing legislation from the Congress*** for the MAI.
- ***State-federal consultation procedures and other state protections*** in the implementing legislation, such as those involving international disputes and state immunity, that are not only consistent with those in Uruguay Round but also are strengthened.

International negotiation of the MAI is scheduled to conclude in May of 1997. Accordingly, it is important for governors to express their views on state sovereignty protections to the federal government in short order. Thereafter, the governors should aim to work with the Congress and the Administration to shape MAI implementing legislation to benefit the states.

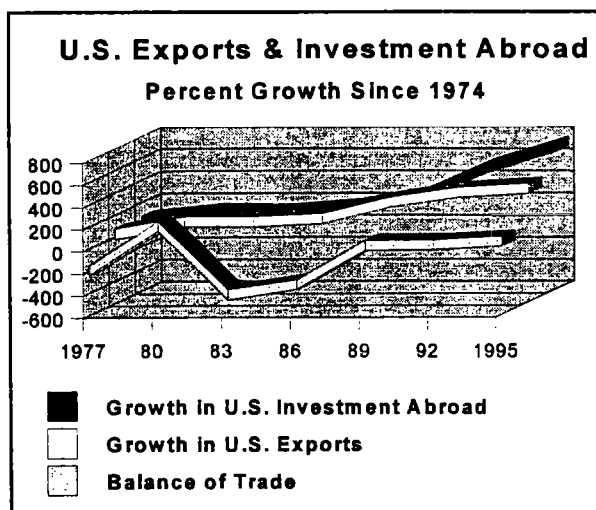
II. INTRODUCTION

A. The Push for Investor Protection

1. Growth of foreign investment. While the media reports frequently on the tremendous growth in global trade, it is less attentive to the even more rapid worldwide growth in foreign direct investment (FDI). What is FDI? According to the U.S. Department of Commerce, "direct investment implies that a person in one country has a lasting interest in, and a degree of influence over the management of, a business enterprise in another country."¹ This contrasts with passive investment in a company's securities, which is considered portfolio investment. The Commerce Department defines FDI as "ownership or control by a foreign person of 10 percent or more of an enterprise's voting securities or the equivalent," which is deemed enough to influence management decisions.²

The United States is the leading importer (\$561 billion) and exporter (\$712 billion) of FDI. Between 1984 and 1995, the U.S. annual inflow of FDI increased by 202 percent, while the U.S. annual outflow increased by 785 percent. The turning point was 1990, after which investment outflow began to exceed the inflow and outward U.S. FDI began to outstrip export growth (see box).³ Inflows have also been substantial -- \$61 billion in 1995 and projected at around \$95 billion for 1996.⁴

These figures reflect the growing stake that investors in the United States and other countries have in foreign operations.⁵ In the West, inward FDI runs the gamut from manufacturing plants to resource-based businesses to high-tech R&D. An indication of the magnitude of FDI in the West, and its relative importance to western states, is presented in the following chart.



FOREIGN DIRECT INVESTMENT IN THE WEST			
State	# Foreign-owned Manufacturing Establishments (1990)	# Employees (1990)	Value of Foreign-owned Affiliates (\$ million) (1992)
WEST	3,079	412,366*	\$236,203
Alaska	24	3,092	\$20,727
Arizona	115	10,998	\$6,456
California	1,361	205,024	\$85,661
Colorado	119	10,964	\$6,916
Hawaii	30	2,087	\$15,454
Idaho	25	3,414	\$810
Kansas	89	13,547	\$2,714
Montana	15	943	\$2,150
Nebraska	54	8,022	\$926
Nevada	27	1,501	\$6,652
New Mexico	34	2,640	\$4,169
North Dakota	7	500-999*	\$1,229
Oregon	119	15,269	\$4,741
South Dakota	21	2,947	\$635
Texas	783	101,890	\$59,432
Utah	51	7,049	\$4,362
Washington	197	22,979	\$10,155
Wyoming	8	100-249*	\$3,014

* North Dakota and Wyoming are given in ranges to protect against disclosure of individual companies.

Source: U.S. Department of Commerce, Survey of Current Business

These numbers, which surely understate today's conditions, represent the success that western states have had in attracting foreign investment. However, they also represent the exposure that states face to challenges by the foreign owners of these investments to state practices that violate U.S. international agreements affecting FDI.

2. OECD negotiations. Spurred by the significant and growing American ownership stake in foreign enterprise, the U. S. government is a leading proponent of a new international agreement to protect investors from discriminatory and distorting government practices and to assure the free flow of capital across international borders. The "Multilateral Agreement on Investment" (MAI) is being proposed to give cross-border investors greater protections than that currently provided by the North American Free Trade Agreement (NAFTA) and the Uruguay Round agreements that established the World Trade Organization (WTO).

The MAI is being negotiated within the Organization for Economic Cooperation and Development (OECD), a group of the world's leading industrialized economies. The Paris-based OECD, consisting of 29 countries,⁶ accounts for more than half of the world's foreign investment.

Fully half of the trade among OECD countries is based on foreign investment in subsidiary companies.⁷

The OECD began its MAI work when it created a high-level “Negotiating Group” in May of 1995. This group meets monthly under a mandate to complete a proposal by May, 1997 for the OECD Ministerial Council, the OECD’s governing body. The United States is represented on the Ministerial Council by the State Department’s Assistant Secretary for Economic Affairs, with assistance from the Office of U.S. Trade Representative (USTR).⁸

The aim of many of the OECD negotiators of the MAI (hereinafter the MAI negotiators) is to curtail the powers not only of national governments but of subnational (i.e., state and local) governments as well, in ways that go beyond NAFTA and the WTO. For example, the MAI may strengthen the NAFTA/WTO national treatment standard with a new “effects test” to protect foreign investors from disparate state treatment even when there is no intent to discriminate against them. The MAI could also add several mandatory constraints on state law-making powers, including limits on economic development incentives and performance requirements, and a duty to compensate investors for “expropriation,” which international arbitration panels would have the power to define. The MAI could also give arbitration panels and domestic courts the power to enforce foreign investor rights against state governments.

Because the United States has a federal form of government, many of the laws governing ... foreign-owned companies are at the state and local level. ... If a balanced agreement that provides the U.S. with access to substantial new markets ... is achieved, we are prepared to bind the states and their sub-divisions, subject, of course to Congressional approval.

- United States Federal Government Paper, “Multilateral Agreement on Investment,” 1996

It is important that the states advance their positions on these proposals before negotiations are completed for several reasons. First, international trade and investment agreements are an ongoing activity of U.S. foreign policy, and it would benefit the states generally to have their interests and the principles of federalism embedded in the approach of federal negotiators. Second, several important state concerns must be addressed in the agreement itself, such as general and country-specific reservations that can exempt state laws from coverage. Third, after negotiations are completed, it will be extremely difficult for the United States to return to the OECD and seek changes to the MAI at the behest of state or local governments. Finally, under one scenario for MAI approval, the Administration will present the MAI to Congress as a self-enforcing treaty, requiring a two-thirds vote of the Senate but no implementing legislation. This would likely eliminate any post-negotiation opportunities to address state concerns or to include in implementing legislation the types of state sovereignty protections that were fashioned for NAFTA and the WTO. In the next section, proposals for the MAI which could have the most significant effects on states are described.

III. PROPOSALS FOR A MULTILATERAL AGREEMENT ON INVESTMENT

The OECD has adopted only general goals for the MAI. A few specific proposals have achieved a consensus, while others are still being debated within the Negotiating Group. This section provides an overview of MAI goals and proposals. In the next section, we draw upon this background to review the potential effects of the MAI on states. This summary does not cover all MAI proposals; it addresses only those of greatest interest to states.

Since MAI negotiations are confidential, this summary is based primarily on a May 1995 report of five OECD working groups and a November 1996 progress report from the MAI negotiators. In the following analysis, proposals by “negotiators” are much more recent and should be considered as carrying more weight than proposals from “working groups.”⁹

A. Investor Protection

*Goal 1: The most general goal is to set high standards for the treatment and protection of investment.*¹⁰

Goal 2: The MAI should “go beyond existing commitments” (e.g., NAFTA and the WTO) to achieve a high standard of protection for investors. The MAI will broaden obligations to go beyond existing nondiscrimination standards of national treatment and most-favored-nation (MFN) status.

1. Scope of protection. The MAI is likely to protect the traditional range of investor rights, including the right to acquire or own any asset, related ownership rights such as the ability to operate a business, and the ability to transfer funds and other capital.¹¹ In addition, expanded prohibitions on discrimination against foreign investors by governments, similar to protections contained in NAFTA and the WTO, are proposed for the MAI. Negotiators are also considering proposals that go beyond more traditional protections to address the negative effects on foreign investment from expropriation, investment incentives, and performance requirements.

2. Discrimination. The MAI aims to protect foreign investors from discrimination by expanding upon two time-honored provisions contained in existing trade agreements:

- **National treatment.** National treatment requires nations to treat foreign investors or investments no less favorably than they treat their own. MAI negotiators are considering two ideas for strengthening national treatment that have particular significance for states. The first proposal is to look not only at whether the purpose of a law is to discriminate, but also at whether it has a discriminatory effect, to determine if it provides national treatment to foreign investors.¹² For example, Canada has complained that a state tax incentive to promote “microbreweries” is a violation of national treatment, not because the law has an explicit intent to discriminate against foreign producers, but because its

effect is discriminatory since Canadian producers are too large to qualify for the benefit.¹³

The second proposal would require “full market access” in the form of uniform treatment of foreign investors within national borders (hereinafter “uniform national treatment”).¹⁴ The ability of laws and regulations to vary among states with regard to foreign investors would likely fail to comply with this version of national treatment under the argument that it fragments the national market into as many as 50 regulatory submarkets. The significant potential impacts of these two proposals are discussed in the next section.

- ***Most-favored nation status (MFN).*** MFN requires nations to give each other the most favorable treatment they give any trading partner. A common state practice that violates MFN is the use of reciprocity; that is, laws which require a state to give foreign investors the most favorable treatment they give domestic investors only if state-based firms are treated in that manner in the foreign investor’s home country.¹⁵

3. Expropriation. The MAI also aims to protect foreign investors from expropriation or “any other measure having similar effect.”¹⁶ This covers any government action that would “have the effect of depriving an investor of its investment” including limits on use and disposal, government regulation (even if it does not affect title or ownership), and partial takings. The scope of this proposal is intentionally broad in order to “serve as a safeguard against new forms of expropriation in the future.”¹⁷ An important aspect of this proposal is that it would apply to foreign investors even if the government measure was non-discriminatory; i.e., if it applied to domestic investors as well.

4. Investment incentives. While an OECD working group opposes government taking, it also opposes government giving when it distorts private market allocation of capital. This includes opposition to the widespread practice of using investment incentives as a tool to promote economic development. Opposition goes beyond discrimination that limits investment incentives to domestic firms, to encompass investment incentives of any kind which inevitably favor recipients over non-recipients (whether domestic or foreign), promote investment in the jurisdiction providing the incentive, and, in many cases, seek to build the capacity of state-based businesses to expand exports and compete globally. The MAI options under consideration include bans or limits on incentives, use of an effects test to determine whether there is injury to foreign investors, stronger national treatment rules to avoid discrimination, and greater transparency (i.e., disclosure of incentives).¹⁸

5. Performance requirements. Even if the MAI does not address investment incentives, an OECD working group also opposes the practice of linking government incentives with performance requirements. Performance requirements commonly dictate that beneficiaries of incentives ensure certain levels of local content, employment, or investment as a condition of receiving the incentive. This is viewed as distorting investment decisions to the benefit of the jurisdiction imposing the requirement. NAFTA set a precedent for the treatment of performance requirements. It prohibits forcing producers or sellers to use domestic content, transfer new technology, or export a certain level of manufactured goods,¹⁹ but it allows performance

requirements promoting economic development or addressing health, safety or environmental standards.²⁰ MAI proposals may go further than NAFTA. The MAI may ban not only local sales, content, and production requirements, employment requirements, and investment requirements, but it may also exclude NAFTA-like exceptions for health, safety, and environmental standards.²¹ For performance requirements it does not ban, the MAI might impose either a freeze on their future use (a “standstill”) or a phase-out over a period of time (a “rollback”).²²

B. Exceptions to the Agreement

1. General exceptions. General exceptions are broad areas of government practice that are formally acknowledged not to fall under the rules of the agreement. MAI negotiators have tentatively agreed on only three general exceptions to MAI investor protections: national security, public order, and international peace and security.²³ This is a major departure from prior trade agreements. WTO general exceptions cover many more categories, maintaining a historical deference to sovereign power to govern in these areas. NAFTA applies WTO general exceptions to most of its investor protections²⁴ and adds several other exceptions to its investment chapter, including exceptions for all local government measures,²⁵ government grant and loan programs,²⁶ and the continuation of existing tax laws.²⁷ The absence of NAFTA or WTO exceptions in the MAI may create an inference that the MAI covers those areas of sovereign powers. The chart on the next page lays out the general exceptions contained in NAFTA and the WTO and those proposed for the MAI.

2. Country-specific reservations. Country-specific reservations are more narrow areas of government practice negotiated with respect to a member country that are formally acknowledged not to fall under the rules of the agreement. MAI negotiators see country-specific reservations as a political necessity to get an agreement, but they recommend a stringent approach to limiting the life of these exceptions.²⁸ They also propose a “roll back” or “sunset” process that removes existing laws in conflict with the MAI over a specified period of time.²⁹ U.S. negotiators have stated that they are prepared to follow the NAFTA precedent and reserve or “grandfather” all existing state laws. Assuming that this position is accepted by the other OECD countries, grandfathering existing state law would likely still lead to a “standstill” or freeze of state lawmaking authority in the future, and it may also entail a “rollback” of nonconforming state laws by some date in the future.³⁰

MAI negotiators are determined to keep [general exceptions and country-specific reservations] to a minimum.

**OECD Secretariat
November 6, 1996**

"SOVEREIGNTY" EXCEPTIONS TO INVESTOR PROTECTION		
Proposed MAI	GATT/WTO Agmts.	NAFTA
■ National security. ■ Public order. ■ International peace and security.	Article XXI - General: ■ National security. ■ International peace/security. Article XX - General: ■ Public morals. ■ Human, animal or plant life or health. ■ Importation of gold or silver. ■ Enforcement of laws consistent with GATT. ■ Products of prison labor. ■ National treasures. ■ Exhaustible nat. resources ■ Commodity agreements. ■ Access to domestic industrial material in short supply. ■ Access to products in short supply. Agreement on Subsidies & Countervailing Measures: ■ Adapt facilities to new environmental requirements. ■ Promote investment in disadvantaged regions.	Chapter 21 - General: ■ National security. ■ Tax treaties, continuation of existing laws, and new laws for collection of otherwise valid taxes. ■ Balance of payments. Chapter 11 - Investment: ■ Local government measures. ■ Govt. procurement, subsidies, grants, loans, guarantees or insurance. ■ Perform. requiremnts. to: (1) meet health, safety, environ. requirements, or (2) locate prod., provide service, train or employ workers, const. facil. or carry out research/devel.

C. Creating Legal Remedies

Goal 3: *The MAI should be legally binding and contain provisions regarding its enforcement.*

Goal 4: *The MAI should apply to all levels of government.*

Goal 5: *The MAI should encourage conciliation and provide for effective resolution of disputes, taking account of existing mechanisms.*

1. Investor-to-government remedies. The MAI could use a "legal" model rather than a "diplomatic" model to enable foreign investors to seek enforcement of the agreement directly against governments at either the federal or state level. Following a legal model, negotiators propose giving investors the right to file claims for damages against governments both in international arbitration forums and in domestic courts.³¹ Arbitration options include existing forums such as the Washington, D.C.-based International Centre for the Settlement of Investment Disputes for investor-to-government disputes,³² and creating WTO-style panels for government-to-

government disputes.³³ The leading precedent for this approach is NAFTA,³⁴ but NAFTA remedies do not apply to any state law in effect at the time of the agreement.

2. Consolidating “class actions.” Federal or state policies that are inconsistent with the MAI may well affect many investors from various countries. The MAI proposal includes a “class action” approach to consolidating claims which is also used in NAFTA.³⁵

3. Subnational enforcement. Private enforcement against state and local government laws is a major goal of the MAI.³⁶ In the WTO setting, if a state law is found to violate the agreement, it provides only a “diplomatic” remedy against the offending national government, such as the reimposition of tariffs by the complaining government. In the MAI, negotiators propose giving foreign investors access to domestic courts to enforce remedies against state laws. Also, the Negotiating Group is considering several options for dealing with countries like Canada and Australia, which do not have federal supremacy to impose MAI mandates on their provinces. The U.S. federal government does have constitutional supremacy and is prepared to bind states if Congress adopts the MAI.³⁷

D. Avoiding Conflicts with Other Agreements

Goal 6: The MAI should seek to avoid confusion about overlap with other agreements, with a view to strengthening rather than undercutting the WTO and avoiding conflict with tax agreements or internationally accepted principles of taxation.

Goal 7: The MAI should have jurisdiction over investment issues that are the subject of regional economic integration agreements and organizations such as NAFTA and the European Union.

1. The WTO. MAI negotiators may look to avoid confusion with the WTO by integrating the WTO with MAI processes.³⁸ For example, an OECD working group has recommended empowering investors to seek damages under the MAI if a state law violates the provisions of another investment agreement that overlaps with the MAI.³⁹ If adopted, this proposal could transform the MAI into an enforcement mechanism that provides expanded legal remedies for at least certain parts of the WTO.

2. Regional trade agreements. An OECD working group anticipates that the MAI would supersede the provisions of earlier trade agreements that are inconsistent with it.⁴⁰ This could include NAFTA’s general sovereignty exceptions as well as its country-specific reservations, which cover all state laws. These exceptions were a critical part of the states’ position during the NAFTA negotiations.⁴¹

3. Special treatment sectors. The MAI may treat several sectors specially or exclude them altogether because of their sensitive nature and historic government involvement or regulation. These include banking,⁴² cultural industries (the United States opposes exclusion),⁴³ air travel, and government insurance programs.⁴⁴

4. Taxation. Taxation is perhaps the paramount sovereignty concern. The United States and a majority of other OECD nations propose to “carve out” taxation altogether, which would leave most tax matters to specialized tax treaties.⁴⁵ However, several European countries are proponents of applying national treatment and MFN principles to taxation under the MAI.⁴⁶ In the past, state government use of unitary tax principals has been attacked by the European Union as a form of double taxation that violates national treatment.⁴⁷ An OECD working group is seeking to “balance the rights of investors against the responsibilities of tax authorities and to develop clear rules in the MAI to ensure certainty and predictability for both.”⁴⁸

The MAI also may address taxation to the extent that tax measures circumvent other proposals besides national treatment and MFN.⁴⁹ For example, taxes can have the effect of limiting repatriation of profits, heavy tax burdens can be attacked as expropriation, and tax credits can violate limits on investment incentives. However, since there has been no public statement on MAI tax proposals, taxation is not further analyzed below.

IV. POTENTIAL MAI EFFECTS ON STATE GOVERNMENT

This section examines areas of state interest that may be in conflict with OECD proposals for investor protection under the MAI. The MAI text that is eventually adopted may be less ambitious than the proposals on which this analysis is based. However, the OECD clearly anticipates future rounds of MAI negotiations and is laying the groundwork for investor protection in which the current negotiations are only the first stage. Even if current negotiations stop short of some of the proposals analyzed below, the long-term OECD agenda may well remain in place for future rounds.

Our approach is to rely not only on the stated intent of MAI negotiators, but to anticipate how the language of MAI proposals might be interpreted by future dispute panels or courts in response to legal claims brought by investors. This approach is necessary because a core purpose of the MAI is to legally empower investors to seek their own remedies and make their own arguments against state laws without mediation by their home governments.

Four key areas of state activity are addressed: economic regulation, environment and land use, economic development, and state sovereignty.

A. Economic Regulation

States exercise a wide range of regulatory authorities over business activity. Regulatory activity that could be impacted by MAI proposals include state rules regarding ownership, residency, business licenses and banking.

1. Ownership or residency requirements. Many states restrict in some way the ownership or sale of real estate, the use of public lands, and business licenses based on residency or citizenship.⁵¹ These restrictions could be inconsistent with proposed MAI antidiscrimination provisions for national treatment. For example:

- *Nebraska*,⁵² *Oklahoma*⁵³ and *Indiana*⁵⁴ limit or prohibit ownership of land by foreign citizens or corporations. *Nebraska* and *Indiana* require foreign citizens and corporations that inherit or acquire land to sell it within five years (if more than 320 acres).⁵⁵
- *Nebraska*,⁵⁶ *Kentucky*,⁵⁷ *Mississippi*⁵⁸ and *Wisconsin*⁵⁹ limit or prohibit ownership of land by nonresident foreign citizens.
- *South Dakota*,⁶⁰ *Oklahoma*,⁶¹ *Colorado*,⁶² *Nebraska*,⁶³ *Missouri*⁶⁴ and *Minnesota*⁶⁵ prohibit foreign citizens and governments from acquiring agricultural land or ranches (some above a minimum acreage).
- *North Dakota*,⁶⁶ *Minnesota*,⁶⁷ *Iowa*⁶⁸ and *Pennsylvania*⁶⁹ prohibit or limit ownership of agricultural land by nonresident foreign citizens.
- *Arizona*,⁷⁰ *Colorado*,⁷¹ *Montana*,⁷² and *Oregon*⁷³ restrict sales of state lands to U.S. citizens or those who have declared their intention to become citizens.
- *Nevada* limits the right to file a mining claim to persons who are U.S. citizens (or declare their intent to become citizens).⁷⁴
- *Oregon* limits licenses to control water rights to U.S. citizens.⁷⁵
- *Alaska*,⁷⁶ *Hawaii*⁷⁷ and *Georgia*⁷⁸ limit or prohibit foreign ownership of some public utilities.
- *South Dakota* prohibits Canadian citizens residing in Canada from forming a South Dakota corporation.⁷⁹

2. Fishing fleet restrictions. State restrictions on commercial fishing could violate proposed MAI standards for national treatment, either because they explicitly favor state residents or

because they have the effect of excluding new market entrants to the disadvantage of foreign interests. For example:

- *California* has imposed a moratorium on commercial salmon fishing licenses until the fleet size falls below 2,500 vessels.⁸⁰
- *Washington* limits the number of fishermen who can make landings of ocean pink shrimp to those who have “historically and continuously” harvested the shrimp.⁸¹
- *Alaska*,⁸² *California*⁸³ and *Oregon*⁸⁴ require a significantly higher fee for nonresident commercial licenses than for resident licenses.
- *Maryland* limits leases of submerged lands for cultivating oysters to state residents, and lessees of submerged oyster beds may not transfer leases to a non-resident.⁸⁵
- *Massachusetts* restricts commercial lobster permits to resident citizens of the state.⁸⁶

3. Business licenses. Many states impose state residency requirements for certain business licenses. Examples of state laws that might discriminate against foreign investors include:

- *California*,⁸⁷ *Hawaii*,⁸⁸ *Idaho*,⁸⁹ *Montana*⁹⁰ and *North Dakota*⁹¹ require a local presence for one or more types of business enterprise.
- *Oregon* requires water developers (including heavy construction, plumbing, well drilling, irrigation, water resources, and solid waste management companies) to be state residents or state-based businesses.⁹²
- *Montana* maintains licensing, fee, and sales reporting requirements for out-of-state but not in-state wholesalers and retailers of produce.⁹³
- *Alaska*,⁹⁴ *North Dakota*,⁹⁵ *Oregon*,⁹⁶ *Nebraska*⁹⁷ and *South Dakota*⁹⁸ limit gaming licenses to state residents or require an in-state preference for amusement or gaming concessions and services. These laws could affect a range of business owners from the corner bar to large hotels and river boat casinos. *Texas*⁹⁹ makes state residence a requirement to own a racetrack where pari-mutual wagering is conducted. *North Dakota* requires corporations with an ownership interest in a race horse to have a place of business within the state.¹⁰⁰

4. Banking regulation. The MAI Negotiating Group has decided to apply the agreement to financial services generally, but negotiators may propose special sector treatment that limits the ultimate application of the MAI to banking law.¹⁰¹ The recent U.S. federal reform of interstate bank branching is likely to level many state laws that might have otherwise been in conflict with the MAI. However, the potential for conflict persists in such areas as community reinvestment

rules, public deposit programs, and state requirements for the location of bank branches, all of which could be seen as performance requirements. Examples in this area include:

- *Washington*,¹⁰² *Iowa*,¹⁰³ *Minnesota*¹⁰⁴ and *Maine*¹⁰⁵ are among states that condition the acquisition of banking assets on meeting performance requirements for community reinvestment or net-new-benefits.¹⁰⁶
- *Arizona*,¹⁰⁷ *New Mexico*,¹⁰⁸ *Iowa*,¹⁰⁹ *Ohio*¹¹⁰ and *Pennsylvania*¹¹¹ are among approximately 20 states that allocate public deposits and other banking business based on community reinvestment performance or local presence.¹¹²

B. Land Use and Environment

MAI negotiators have not identified environmental measures as a particular problem for foreign investors. However, they may oppose adoption of the general exceptions found in the WTO for environmental measures that may be inconsistent with the MAI. This section identifies state environmental measures that might run afoul of MAI proposals.

1. Limits on the use of state lands. Many states seek to balance economic development with sound resource management on state lands. They do this by placing limitations and controls on the sale of public lands and the use of its resources. One of the mechanisms used is to limit beneficial use to state residents. Many of these measures could violate anti-discrimination and MFN protections for investors under the MAI. For example:

- *Alaska*¹¹³ and *Montana*¹¹⁴ limit permits for mineral extraction on state lands to U.S. citizens or corporations and foreign applicants whose home country offers the same rights to U.S. citizens.
- *Arizona* limits the sale of public lands to state residents or state-based businesses.¹¹⁵ *Arizona* also limits the right to apply for a right-of-way over public land or a permit to use public land for grazing, extracting oil or gas,¹¹⁶ or purchasing timber to U.S. citizens and corporations authorized to conduct business in Arizona.¹¹⁷
- *Hawaii* maintains residency and citizenship requirements for agricultural public lands that are sold or leased without a public auction.¹¹⁸
- *Utah* restricts to U.S. citizens the right to apply for the use of unappropriated water.¹¹⁹
- *Wyoming* limits mineral extraction from state lands to U.S. citizens, and limits eligibility for state royalty in-kind for refining operations to those conducted entirely within the state.¹²⁰

- *Oregon*¹²¹ and *Wyoming*¹²² give preference for leasing state land to residents of the state who occupy adjoining land.
- *Idaho*¹²³ and *Oregon*¹²⁴ prohibit the sale of unprocessed timber to foreign countries. *Idaho* also restricts 95 percent of timber sales from state lands to parties who do not export logs outside of the state for further sale or processing.

2. Limits on the development of private land. Land use and environmental laws are widely used by states to limit landowners in the ways that they develop their property to protect natural resource and environmental values. Land development is clearly an investment that would fall within the scope of the MAI.¹²⁵ Since land use laws do not treat foreign developers differently from domestic ones, the issue is not one of explicit discrimination. Rather, the question is whether a foreign investor could challenge these rules on the grounds that they are inconsistent with the following MAI proposals for investor protection:

- ***Uniform national treatment:*** Land use rules vary widely among states. If the MAI sets a uniform national treatment standard, investors may be able to complain that divergent state laws are inconsistent with this proposed MAI protection.
- ***Expropriation or regulatory taking:*** Land owners sometimes argue successfully that land use restrictions so reduce the use or value of their land as to amount to a regulatory taking. MAI proposals may empower international arbitration panels to set lesser standards than those used by American courts for determining when the burden of regulation becomes a taking or “expropriation.”
- ***Performance requirements:*** Under the MAI, land use rules may be seen as performance requirements tied to permits. Common requirements such as mitigation measures and energy or water conservation technologies are possible sources of conflict.¹²⁶

Even if negotiators do not intend to cover land use laws, foreign investors could try to use the MAI to challenge them. We have noted above that the WTO has general exceptions covering environmental measures, while the MAI as proposed does not. In the future, an MAI arbitration panel might conclude that this omission is purposeful and that the MAI should apply to allegedly burdensome land use rules. Examples of state limits or controls on private land development that may run afoul of the MAI include:

- ***Most western states*** require reclamation of surface-mined areas with requirements that exceed or differ from minimum federal standards.¹²⁷ These include sealing acid-producing materials, covering mined areas with soil that will support vegetation, extensive planting, and constructing drainage and anti-erosion systems.

- **Washington** protects tidal wetlands and coastal areas by authorizing restrictive zones within local zoning controls.¹²⁸ In King County, for example, local governments regulate alteration of topography, mineral extraction, timber harvest, agricultural expansion, utility projects, road construction, golf courses and marine facilities.¹²⁹
- **California** protects coastal areas by requiring that new development adjacent to sensitive habitat areas be designed to avoid adverse impacts.¹³⁰ The coastal zoning law also limits conversion of agricultural land to other purposes,¹³¹ and requires most development to be next to an existing developed area with infrastructure.¹³²
- **Regional - Maryland, Virginia and Pennsylvania** coordinate their wetlands regulation in order to protect the Chesapeake Bay.¹³³ Under this agreement, Maryland protects nontidal wetlands by regulating the destruction of plant life, alteration of topography, and changes to the drainage or flood retention characteristics of land.¹³⁴

Any of these laws can impose substantial design, mitigation, or infrastructure burdens on developers. These laws may also reduce the value of the land. American courts have upheld the government's power to regulate development to achieve valid public purposes without compensation, but an OECD arbitration panel might interpret MAI investor protections with different results.

3. Regulation of oil shipments. Anticipating an 800 percent increase in oil tanker traffic, Washington is the first state to enact standards that are designed to prevent oil spills rather than cope with them after the fact.¹³⁵ An international trade association is seeking to preempt this law with several legal arguments that failed in federal district court.¹³⁶ If the state prevails on appeal in this case, other states are considering following Washington's lead.¹³⁷

MAI proposals could have led to different results before an MAI arbitration panel. Under an effects test for national treatment, the association could have argued that the Washington law has the effect of favoring Washington-based tanker companies over foreign companies that make fewer trips to local ports. Under uniform national treatment, they could have argued that the Washington law exceeds the safety standards of both federal law and several international treaties. Tanker owners might also have been able to argue under the MAI that the Washington law imposes performance requirements by requiring investment in certain equipment, management systems and crew training.

4. Incentives for investment in pollution prevention and control equipment. Many states provide tax or grant incentives to stimulate investment in pollution prevention or control equipment. Foreign investors could complain that, while these incentives do not explicitly discriminate against foreign investors, they do tend to promote investment in the jurisdiction that provides the incentive and are inconsistent with several MAI proposals:

- **Limits on incentives and performance requirements:** Environmental investment incentives are designed to subsidize specific kinds of investment within the states that offer them. Foreign investors could claim that they are inconsistent with proposed MAI limits on investment incentives. In addition, in order to receive these incentives, states require an investor to perform in ways that benefit the environment. Investors could claim that this is inconsistent with proposed MAI limits on performance requirements.
- **National treatment - effects test and uniform national treatment:** Tax incentives for pollution prevention and control could give a significant advantage to facilities located within states that offer them versus facilities located outside those states. Accordingly, foreign investors could claim that they fail stronger proposed national treatment tests under the MAI.

Several states exemplify the range of environmental investment incentives in use (see box):

- **California** provides a 40 percent corporate income tax deduction for renewable energy or pollution control machinery or property in an economic development area.¹³⁸
- **Oregon** provides a 10 percent corporate income tax credit for investment in production technology or processes that reduce air emissions.¹³⁹
- **Washington** provides an exemption from its sales and use tax for original acquisition of a pollution control facility.¹⁴⁰
- **Arizona** law creates a public finance corporation that uses bonding authority to promote investment in pollution control technology.¹⁴¹
- **Colorado** has an incentive program for conversion of vehicles to alternative fuels; it provides rebates, loans, grants and other incentives.¹⁴²

POTENTIALLY AFFECTED STATE LAWS: ENVIRONMENTAL INVESTMENT	
----- TAX INCENTIVES -----	
Alabama	Mississippi
Arizona	Montana
California	North Carolina
Colorado	North Dakota
Connecticut	Ohio
Florida	Oregon
Indiana	Rhode Island
Iowa	South Dakota
Kentucky	Texas
Louisiana	Washington
Maryland	West Virginia
Michigan	Wisconsin
----- GRANT/LOAN INCENTIVES -----	
Arizona	Iowa
California	Montana
Colorado	Vermont

5. Incentives for investment in recycled materials markets. Thirty-one states promote investment in facilities for processing recycled materials through a combination of tax benefits, public procurement preferences, and private market regulation such as recycled content rules.

While these policies do not explicitly discriminate on the basis of nationality, foreign investors could claim that they are inconsistent with the following proposed MAI investor protections:

- **National treatment - effects test:** Rules requiring a certain percentage of recycled content in products create an incentive to locate processing facilities within or near the jurisdiction that imposes the mandate, due to the cost of transporting unprocessed material for recycling.¹⁴³ Foreign investors could claim that the advantage afforded firms within the jurisdiction fails a stronger effects test proposed for national treatment.
- **National treatment - uniform national treatment:** Foreign investors may be able to claim that differing state measures fragment the market, which results in a failure to provide national treatment.
- **Performance requirements:** Foreign investors may be able to argue that conditioning a tax benefit on investing in production facilities to change production processes from virgin to recycled materials amounts to an investment-distorting performance requirement.¹⁴⁴

Thirteen states use private market regulation or tax benefits to promote markets for recycled newsprint, glass or plastic.¹⁴⁵ Twenty-nine states use procurement preferences to do the same.¹⁴⁶

- **Newsprint market - California,¹⁴⁷ Oregon¹⁴⁸ and Connecticut¹⁴⁹** are leaders among the eight states that mandate a minimum percentage of recycled content in newsprint.
- **Container market - California¹⁵⁰ and Wisconsin¹⁵¹** are among the states that mandate a minimum percentage of recycled content in glass or plastic containers.
- **California** requires recycling equipment to process at least a specified percentage of material generated within the state of California to receive tax benefits.¹⁵²
- **Procurement preferences - California, Texas, and Michigan¹⁵³** are among states with statutory preferences for the purchase of materials with recycled or recyclable content. California uses a price preference that applies to paper, glass, oil, plastic, solvents, paint and tires.¹⁵⁴ Texas requires agencies to apply 8 percent of their procurement budgets to the purchase of recycled materials.¹⁵⁵

A state recycled-content law is a good example of a practice that could be argued to violate both trade and investment agreements. It could violate a trade agreement because it seeks to regulate how a product is made rather than how it performs. The same law could violate an investment agreement because it diverts investment from where it would otherwise flow. Under the MAI, foreign investors may be able to argue that recycling incentives are aimed at influencing investment decisions more than at resource conservation. In any event, state promotion of recycled materials markets is likely to come within the scope of both investment and trade

agreements. MAI language on which agreement should control in cases of overlap will be important, as will any proposal to provide remedies under the MAI to foreign investors for interests that are protected by other agreements.

C. Economic Development

Virtually every state provides incentives for economic development in the form of tax benefits, grants and loans, job training programs, and procurement preferences. A long-running domestic debate continues over whether these incentives provide a good return to the taxpayer. Based on the same arguments used in the United States, an OECD working group opposes development incentives because they distort private investment patterns, provide windfalls to act in ways investors would have acted anyway, seek to enhance individual state exports and global competitiveness, and stimulate competition among governments that is costly to taxpayers without producing a net gain in national or global productivity.¹⁵⁶

Many state and local governments, on the other hand, take the view that if they do not use incentives to compete for investment dollars the investments will go elsewhere. This is particularly the case in rural areas and inner-cities. Unlike NAFTA and the WTO, the MAI proposals include no exceptions for development incentives targeting economically disadvantaged areas.

MAI proposals include a number of options, including an outright ban on incentives, limits on the amount or purposes of incentives, a “standstill” on future incentives, a “rollback” of existing incentives, and an effects test to strengthen national treatment of foreign investors when overt discrimination is absent.¹⁵⁷ These options may be in play, but there is growing sentiment “that companies should be able to continue to benefit from incentives and that the MAI should not interfere with how governments seek to promote investment” apart from non-discrimination rules.¹⁵⁸

There are many state programs that fall within the scope of MAI recommendations to limit development incentives. Examples of the potential conflicts between state interests and MAI proposals to limit or eliminate incentives follow:

1. Tax incentives. State and local governments currently offer over 600 tax incentives that are designed to influence the location and purpose of investments and enhance the competitiveness of state-based firms.¹⁵⁹ If the MAI bans or limits incentives, foreign investors may be able to challenge state tax incentives outright, or argue that they favor recipients and the offering jurisdiction, like the microbrewery example used earlier. Other examples include:

- **35 states**¹⁶⁰ provide tax incentives for job creation, including **Oregon** (property tax exemption),¹⁶¹ **Hawaii** (exemption from income tax on special revenue bonds),¹⁶² and **North Dakota** (exemption from business income tax).¹⁶³

- **31 states**¹⁶⁴ provide tax incentives for industrial development, including **North Dakota** (exemption from property tax),¹⁶⁵ **Washington** (exemption from sales and use tax),¹⁶⁶ and **Texas** (exemption from industrial equipment value tax).¹⁶⁷
- **45 states**¹⁶⁸ provide tax incentives for raw materials used in manufacturing, including **Washington** (exemption from sales tax),¹⁶⁹ **California** (exemption from sales and use tax)¹⁷⁰ and **Texas** (exemption for nonprofit development corporation that processes raw materials).¹⁷¹

2. Non-tax incentives. Almost every state also provides investment incentives in the form of grants, low interest loans (industrial revenue bonds, direct loans, loan guarantees), equity investments, and in-kind assistance such as customized job training. Again, depending upon how the MAI effects incentives, foreign investors may be able to argue that state non-tax incentives favor recipients in the offering jurisdiction and violate the MAI. Examples include:

- **49 states** offer subsidized industrial revenue bond financing as an investment incentive.¹⁷²
- **44 states** offer customized job training as an investment incentive.¹⁷³
- **23 states** make various types of grants for economic development.¹⁷⁴ For example, **Hawaii** created an agricultural development revolving fund that can make grants or purchase securities to help state-based agribusiness companies.¹⁷⁵
- **18 states** provide venture capital.¹⁷⁶ **Texas**¹⁷⁷ and **Colorado**¹⁷⁸ are leaders in creating state-chartered corporations that make equity investments to leverage additional private-sector investment.

3. Enterprise zones. Enterprise zones are geographic areas, recognized by federal, state, and local governments to receive coordinated targeting of investment incentives and deregulation. As noted above, the WTO has a general exception for subsidies that are targeted to disadvantaged regions.¹⁷⁹ No such exception is proposed for the MAI.¹⁸⁰ The following are examples of state enterprise zone legislation:

- **Texas** requires “qualified businesses” to locate within an enterprise zone and meet specific performance requirements in order to receive enterprise zone benefits.¹⁸¹
- **California** gives priority for giving loans and loan guarantees to small businesses located within an enterprise zone.¹⁸²
- **Oregon** provides a property tax exemption for businesses that locate in an enterprise zone.¹⁸³

4. Discriminatory practices in granting incentives. In addition to bans or limitations on investment incentives, the MAI may also protect foreign investors against discrimination in the provision of incentives. Several states explicitly limit certain kinds of development assistance on the basis of residency or citizenship. For example:

- *Montana* prohibits small businesses with nonresident alien shareholders from taking investment tax credits.¹⁸⁴
- *Oklahoma* requires applicants for agricultural loans to be state residents.¹⁸⁵ *Oklahoma* also requires the incorporators of a business development corporation to be state residents.¹⁸⁶
- *Arizona* limits eligibility for economic development assistance to residents.¹⁸⁷

5. Economic accountability. A growing number of states have provided development incentives only to see their value vanish as beneficiaries move out of state or otherwise fail to fulfill their promises. In response, at least 15 states have enacted accountability measures that legally bind beneficiaries to perform in various ways, refund the contribution, or suffer penalties. These are called “clawback” policies.¹⁸⁸

Economic accountability policies could run afoul of MAI proposals banning or limiting the incentives with which they are linked. They might also run counter to MAI proposals limiting performance requirements that distort investment to the benefit of the jurisdiction offering the incentive¹⁸⁹ and protecting investors’ right to transfer assets or funds, as illustrated by the examples below.¹⁹⁰

Affected State Laws: ECONOMIC ACCOUNTABILITY	
Arizona	Nebraska
Connecticut	New Mexico
Colorado	New York
Georgia	Ohio
Iowa	Pennsylvania
Indiana	Texas
Maryland	Vermont
Mississippi	West Virginia

- *Arizona* requires businesses to meet performance standards within five years of completing facilities with state incentives; the state may recapture the funds if the business does not meet the standards.¹⁹¹
- *Colorado* has explicit clawback terms in its customized job training program. Companies must certify how many jobs they will create and how much they will pay workers.¹⁹²
- *Iowa* requires companies that receive tax abatements to pay at least 75 percent of the county average wage.¹⁹³

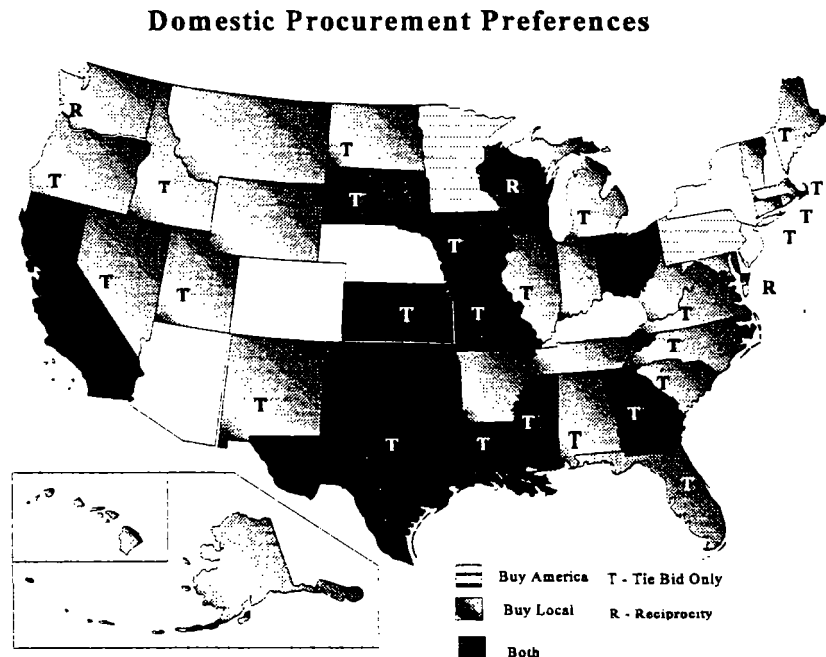
NAFTA accommodates such accountability measures through exceptions for performance requirements to locate production, provide a service, train or employ workers, construct or expand facilities, or carry out research and development within the jurisdiction that provides the incentive.¹⁹⁴ No exceptions have been proposed for the MAI.

6. Domestic procurement preferences. State procurement practices receive major emphasis in foreign complaints about U.S. barriers to trade, particularly “buy domestic” programs and small business set-asides.¹⁹⁵ These practices could run afoul of the MAI if they are viewed as discriminating against foreign investors or creating investment-distorting incentives. There already is a WTO Agreement on Government Procurement (AGP) to which 37 governors have agreed to bind their states. For this reason, MAI negotiators have stated a preference that “the MAI should not interfere with the obligations of the Agreement on Government Procurement.”¹⁹⁶

Thirteen states have not joined the AGP, including *Alaska, New Mexico, and Nevada*. Procurement practices in these states may fall under MAI jurisdiction if state rules create investment distorting discrimination, serve as investment incentives (since preferences often result in above-market prices), or if they serve as performance requirements by favoring local content or disadvantaged bidders.¹⁹⁷

Should the MAI overlap with the AGP and govern procurement in the 37 AGP-signatory states, these states would be exposed to the MAI’s binding legal remedies available to foreign investors. And, while the AGP includes the same general exceptions as the WTO and adds exceptions for the services of handicapped persons, philanthropic institutions, and prison labor, none of these exceptions are proposed for the MAI.¹⁹⁸ The United States also secured country-specific reservations in the AGP to avoid conflict with several federal and state procurement preference programs. These cover procurement preferences promoting business development by minorities, women and veterans; development of distressed areas; and environmental quality.¹⁹⁹

Furthermore, individual states were allowed to apply the AGP only to as much of their procurement as they desired. Many states list their own reservations to the AGP, including *Hawaii, Kansas, South Dakota, and Washington*.²⁰⁰ No country-specific reservations have been proposed for the MAI.



D. Enforcement and State Sovereignty

1. MAI legal remedies. MAI negotiators propose to give foreign investors the right to seek monetary damages for both past and future losses, and to seek legal rulings on whether domestic laws violate investor protections under the MAI. Foreign investors may also have a choice of using international arbitration panels or domestic courts to seek damages.²⁰¹ While international arbitration panels might be friendlier fora for foreign investors, access to domestic courts gives them the ability to seek injunctions to stop enforcement of offending laws, a power that international arbitrators do not have. Under NAFTA, investors can have it both ways. They can prosecute their claim for damages in an international arbitration forum and then seek “injunctive, declaratory or other extraordinary relief, not involving the payment of damages” in domestic courts.²⁰²

While NAFTA’s investment chapter is a precedent for this MAI proposal, NAFTA also sets the precedent of Congressional implementing legislation that blocks investor access to domestic courts to enforce the agreement. The NAFTA implementation act provides that only the United States government may use U.S. courts to enforce NAFTA against the states.²⁰³

Congress may again be able to exercise its power to limit use of U.S. courts under the MAI, but only if the MAI is submitted to Congress in the form of legislation that must pass both houses by majority vote. References to implementing legislation below are meaningful only if the Administration takes that route to obtain Congressional approval.

MAI enforcement proposals will confront U.S. policymakers with a number of choices if Congress considers implementing legislation:

- ***Use of domestic courts.*** Will investors have a right to use domestic courts to seek damages or injunctive relief? As in the case of NAFTA, it would only be through implementing legislation that Congress could foreclose enforcement of the MAI in the courts by any party other than the United States government.
- ***Controlling law.*** The implementing legislation for both NAFTA and the WTO state that if a provision of the agreements conflicts with federal law (which includes the Constitution), then that provision has no effect.²⁰⁴ In contrast, the MAI proposal takes the approach that domestic law applies only to the extent that it is consistent with the MAI.²⁰⁵
- ***States as parties.*** The MAI would apply to government at all levels. Does that mean that foreign investors could bring legal claims directly against state governments? Or would an investor have to sue the United States for a claim against state law? Congress could act to block direct legal claims against states even in an international forum, or it could permit states to be named directly and defend themselves or at least participate in defending themselves.

- **Self-defense.** If the United States is the named party, would states be able to defend their laws in an international forum? In the NAFTA implementing legislation, Congress requires the federal government to consult with states if their laws are the basis of a legal claim, but states have no right to defend themselves.²⁰⁶
- **Recouping damages.** If the United States is the named party, would the U.S. federal government be able to withhold federal funds or sue states to recoup monetary damages that are awarded on the basis of an offending state law? If Congress were to provide for this, it would exert considerable federal enforcement power over states. Even without this financial leverage, the federal government would have the supremacy power to ask U.S. courts to prohibit enforcement of state laws that contravene the MAI.

Enforcement of the MAI against states by the federal government is the ultimate remedy, whether it takes the form of a lawsuit seeking preemption of state law or less litigious methods such as the withholding federal funds from noncompliant states. While federal officials may hope to avoid using these methods, they may be compelled to do so if they are obligated to implement the MAI as it has been proposed.

2. State sovereign immunity. Enforcement of MAI remedies involving legal action by foreign investors against states in federal court, either in an original case or an action to enforce an international arbitration award, raises the issue of state sovereign immunity under the 11th Amendment of the Constitution. The 11th Amendment denies foreign citizens or citizens of another state the option of suing American states in federal court unless the state consents or unless Congress has the power to waive state immunity.²⁰⁷

Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh amendment prevents congressional authorization of suits by private parties against unconsenting States.

**U.S. Supreme Court in
*Seminole Tribe v. State of Florida***

Until very recently, it would have been thought that Congress had the authority to waive state sovereign immunity for foreign investor lawsuits in federal court. However, in the 1996 case of *Seminole Tribe of Florida v. Florida*, a closely divided Supreme Court ruled that Congress has the authority to waive state sovereign immunity only under its 14th Amendment powers, which include the power to protect property rights, but not under its general powers to regulate commerce.²⁰⁸ Specifically, the Court ruled that the 11th Amendment barred Congress from empowering the Seminole tribe to sue the State of Florida in federal court to enforce federal rights under the Indian Gaming Act. This decision opens the question of whether property rights protected under the 14th Amendment extend to the protections for foreign investors proposed for the MAI, giving Congress the power to waive state sovereign immunity under the MAI.

In the *Seminole* case, the Supreme Court also discussed two alternative mechanisms that could be used to enforce the MAI. The first is a federal lawsuit by the U.S. government seeking preemption of state law. This is the approach used in the implementing legislation for NAFTA and the WTO.

The second approach is a lawsuit by individuals against a state official, rather than the state itself, to ensure that the official's future conduct complies with federal law.²⁰⁹ This option provides injunctive relief only, not damages against the state or the state official. For example, by adopting MAI investor protections through a federal statute, Congress might enable a foreign investor to sue an administrative official, such as a governor. In that case, the investor could seek a court order that requires the official to comply with the terms of the MAI.

A third approach would be for Congress to give investors remedies that would be enforceable in state courts if access to federal courts is barred. Of course, these latter two approaches would not be available if Congress bans private legal action in MAI implementing legislation as was done for NAFTA and the WTO.

3. Equal protection. Congressional adoption of MAI implementing legislation could raise significant legal or policy issues regarding equal protection of the laws. Many MAI proposals go beyond matters of discrimination, such as the proposals to ban performance requirements, limit incentives, and require compensation for expropriation or other government actions that reduce the value of an investment. Foreign investors will be able to choose international arbitration panels which are not bound to follow the established doctrines of American courts to interpret these protections. As noted above, these panels may give foreign investors property rights or remedies that are superior to those of domestic investors under U.S. constitutional law.

4. Delegation of judicial power. The implementing legislation for both NAFTA and the WTO say that "No provision of [NAFTA or the WTO], nor the application of such agreement to any person or circumstance, that is inconsistent with any law of the United States shall have effect."²¹⁰ In contrast, MAI negotiators have asserted that MAI provisions will be the substantive law governing any disputes, with domestic law relevant only when it is consistent with the MAI.²¹¹

Under these conditions, an international forum would have the power to render awards or write opinions on whether U.S. state governments are violating the MAI. Although this approach is already embodied in other trade agreements, a number of legal scholars predict that it can be successfully challenged as an unconstitutional delegation of judicial power. Their argument is that multinational arbitration delegates judicial power to a forum outside the federal system, which violates the balance of federal powers and Article III of the Constitution.²¹² They also argue that international arbitrators would "exercise significant authority" under laws of the United States²¹³ without being appointed by the President and confirmed by the Senate, violating the Appointments Clause of the Constitution.²¹⁴

V. Addressing State Interests in the MAI

A. The MAI Process - How The States Can Be Heard

There are four key stages in the MAI negotiations:

1. Core proposals. Negotiations on core proposals will continue at the OECD through Spring, 1997 when the OECD Ministerial Council is scheduled to consider a final agreement. As discussed, key core proposals include the expansion of national treatment and MFN, disciplines on expropriation, incentives, and performance requirements, and new remedies for enforcement.

2. General exceptions. General exceptions to the MAI will be negotiated along with core proposals through Spring, 1997. They will create a permanent deference to sovereign authority within the MAI, including the authority of states to continue lawmaking in any areas that are covered.

3. Country-specific reservations. Negotiations on country-specific reservations are likely to follow general agreement on the MAI text.²¹³ Country-specific reservations are the USTR's preferred means for protecting state sovereignty interests because they have the least impact on negotiations as a whole.²¹⁴

4. Implementing legislation. If the Administration proposes the MAI as an agreement rather than a treaty, it will require implementing legislation. There are a number of important issues that states can address in implementing legislation, including waiver of sovereign immunity, right of states to defend themselves in international arbitration, availability of non-monetary remedies, and other safeguards such as consultation and notice procedures.²¹⁵

We expect to take exceptions for certain subfederal measures... [I]n BITs, NAFTA and GATS we have bound U.S. subfederal levels... while carving out certain sensitive measures or sectors, or while taking specific exceptions for non-conforming measures. We will look to these models in handling the subfederal issue in the MAI negotiations.

- United States Federal Government Paper, "Multilateral Agreement on Investment," 1996

B. Recommended State Actions

Governors and other state officials have the opportunity to influence decisions at each stage of MAI negotiations. While negotiations are underway, the governors can influence and in many cases support U.S. negotiating positions by making their policy preferences known to the federal government. Should the MAI be subject to Congressional implementing legislation, the governors will have an opportunity to influence this legislation during Congressional deliberations, as well as any related statements of administrative action crafted by the USTR and other agencies. Recommendations to the governors for advancing state interests include:

- 1. Communicate to federal negotiators both support and concern.** The governors can demonstrate leadership by immediately communicating support for the MAI to U.S. policy makers while at the same time expressing concerns about its potential impacts on state sovereignty. The governors should adopt the following policies and communicate them to the federal government.
- Governors support in principle an agreement that will encourage foreign investment and improve the economy in their states.
 - The MAI should preserve the power of states to discriminate for legitimate purposes as defined by the U.S. Supreme Court, particularly with respect to (a) rational bases for residency requirements and (b) the sale or use of state land as a resource that the state holds in trust for its residents.
 - Proposals for expansion of the traditional definitions of national treatment, MFN, and expropriation could have significant negative impacts on state measures. They should not be expanded in ways that limit state sovereignty.
 - Investment incentives and performance requirements are important tools of state government in areas ranging from economic development to environmental protection. The MAI should not limit a state's ability to use these mechanisms to achieve legitimate public purposes.
 - General exceptions in the MAI should be consistent with those provided in NAFTA and the WTO. Country-specific reservations should follow the NAFTA model that reserves all current state measures that might conflict with the MAI. Exceptions and reservations should endure over time; that is, there should be no standstills or rollbacks.
 - The MAI should not take precedence over NAFTA or the WTO, and investors should not be able to use the MAI to enforce other agreements.

- The Administration should submit the MAI to Congress as an executive agreement, not as a treaty, so that implementing legislation is required. Consistent with NAFTA and WTO legislation, implementing legislation should include the following sovereignty protections:
 - Procedures for consultation with the states by the Administration on matters of international trade and investment policy should be strengthened. For example, State Points of Contact (SPOC) designated by the Governors should have access to negotiating documents made available to federal policy advisors. Second, SPOCS should have secure electronic communications links established with USTR.
 - Consultation with the states and Congress should be required before the Administration attempts to preempt state law inconsistent with the MAI or sue an offending state to recoup monetary damages that have been awarded against it by an international arbitration panel.
 - State sovereign immunity should not be waived, and private investor suits against states or their officials in U.S. courts should be foreclosed.
 - States should be able to directly participate in the defense of their own measures when they are challenged by investors in international proceedings.

2. Communicate MAI policy to Congress. The governors should communicate these same views to Congressional leaders, particularly with respect to the need for and details of implementing legislation designed to protect state sovereignty.

3. Involve other state organizations. The governors should call on the appropriate state and professional associations to monitor the MAI negotiations and developments in Congress. In conjunctions with the governors, they should continue to advocate state interests as MAI negotiations and the approval process advance. In addition, these groups should report frequently to the governors on the follow through of the federal commitments made to the states.

V. CONCLUSION

Foreign investors consider many of the policies that distort investment to exist at the state level, where corporations are chartered and real estate and other assets regulated. The European Union claims that American federalism results in “market fragmentation” which thwarts national treatment.²¹⁶ But federalism is by design a bottom-up assembly of democratic institutions with diverse and conflicting outcomes.

The MAI could supplant bottom-up processes for preserving differences between nations, much less between subnational governments. The MAI may be more than merely a tougher NAFTA or WTO. Unlike those agreements, the MAI may protect investors by curtailing both sovereign powers and sovereign immunity.

While America’s overseas investors may stand to gain from these trade-offs and FDI may grow even faster, American state and local officials have much to think about. The complexity of our federal system, which confounds foreign investors, also complicates the task of assessing the ways in which this system would be impacted by the proposed MAI. MAI proposals and country positions are also subject to change as negotiations proceed, making ongoing attention necessary. No one can do this job better than governors and other state officials, once they know what the MAI portends. This report is intended to help state leaders get started on the MAI, and balance state interests with the forces of global economic integration.

ENDNOTES

1. U.S. Department of Commerce, Economics and Statistics Administration, Bureau of Economic Analysis, Foreign Direct Investment in the U.S.: 1992 Benchmark Survey, p. M-3.
2. U.S. Department of Commerce, Foreign Direct Investment in the U.S.: 1992 Benchmark Survey, p. M-3.
3. OECD International Direct Investment Statistical Yearbook, (1996) tables II, III.
4. *The Wall Street Journal*, Vol. 126 no. 23, February 3, 1997, p.1.
5. U.S. Dept. of Commerce, *Survey of Current Business*, Foreign Direct Investment in the U.S., Table 1.
6. OECD member nations include Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxemburg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States.
7. World Bank, *World Investment Report* (1995); Konstantinos Adamantopoulos and Daniel Price, "Towards a Multi-Lateral Investment Regime: Results in the Uruguay Round and Prospects in the OECD," *International Banking and Financial Law* (Pearson Professional Ltd., March 1995) 1.
8. The lead State Department official is Alan Larsen, Assistant Secretary of State. The lead USTR official is Jeff Lang, Deputy USTR. *Inside U.S. Trade* (November 1, 1996) 6.
9. OECD Secretariat, Main Features of the MAI (November 6, 1996) ¶1.
10. This goal and all subsequent goals are paraphrased from *MAI Report* 11.
11. OECD, *Main Features of the MAI* ¶¶ 12-15; Working Group C, *Investment Protection* [hereafter Working Group C], in *OECD Documents*; *MAI Report*; Working Group D, *Dispute Settlement* [hereafter Working Group D], in *OECD Documents* 155.
12. OECD, *Main Features of the MAI* ¶ 37; Working Group A, in *OECD Documents* 118.
13. *See United States - Measures Affecting Alcoholic and Malt Beverages*, GATT Doc. DS23/R, BISD 39S216 (adopted on June 19, 1992). This case is generally referred to as "Beer II."
14. Working Group A, in *OECD Documents* 119; *see* European Commission, *Report on United States Barriers to Trade and Investment - 1994* (Brussels, April 1994) 9.
15. Working Group A, in *OECD Documents* 122.
16. OECD, *Main Features of the MAI* ¶ 20; Working Group C, in *OECD Documents* 138.
17. Working Group C, in *OECD Documents* 138.
18. Working Group B, in *OECD Documents* 131.
19. NAFTA Art. 1106.
20. NAFTA Arts. 1106.2 and 1106.4.
21. OECD, *Main Features of the MAI* ¶ 44.
22. Working Group B, *New Issues*, in *OECD Documents* 129.
23. OECD, *Main Features of the MAI* ¶ 60; Working Group A, in *OECD Documents* 120.
24. NAFTA Art. 2101.1.
25. NAFTA Art. 1108.7 is an Investment Chapter general exception from national treatment, MFN and senior management or boards of directors (not from performance requirements).
26. NAFTA Art. 1108.7 is an Investment Chapter general exception from national treatment, MFN and senior management or boards of directors (not from performance requirements).
27. NAFTA Art. 2103.4(d) and (e).
28. Working Group A, in *OECD Documents* 117.
29. OECD, *Main Features of the MAI* ¶ 65; Working Group A, in *OECD Documents* 117-118.

30. Statement by Gary Clements, U.S. Department of State, to the Agriculture and Trade Committee, National Conference of State Legislatures, December 12, 1996.
31. OECD, *Main Features of the MAI* ¶ 84; Working Group D, in *OECD Documents* 151-154.
32. OECD, *Main Features of the MAI* ¶ 86.
33. OECD, *Main Features of the MAI* ¶ 69; Working Group D, in *OECD Documents* 151, 154.
34. NAFTA Art. 1121.1 and 1121.2; Art. 105; Art. 1116.
35. OECD, *Main Features of the MAI* ¶ 92; Working Group D, in *OECD Documents* 155; Working Group C, in *OECD Documents* 136; NAFTA Art. 1126.
36. Working Group A, in *August 15, 1996 Documents* 123.
37. United States Federal Government paper, "Multilateral Agreement on Investment" 4 (1996).
38. Working Group E, in *OECD Documents* 163-164. The WTO agreements that overlap the most with MAI proposals include the Agreement on Trade-Related Investment Measures (TRIMs), General Agreement on Trade in Services (GATS), Agreement on Subsidies and Countervailing Measures (SCM), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), and the Agreement on Government Procurement (AGP).
39. Working Group C, in *OECD Documents* 146-147.
40. Working Group E, in *OECD Documents* 159.
41. see Orbuch, Paul and Thomas Singer. 1995. "International Trade, the Environment, and the States: An Evolving State-Federal Relationship". *The Journal of Environment and Development*, Vol. 4, no. 2 (Summer).
42. OECD, *Main Features of the MAI* ¶ 101.
43. Gary G. Yerkey, "OECD Negotiators Hope to Minimize Derogations in New Investment Accord, International Trade Reporter (Vol. 13, No. 11, March 13, 1996) 433; Gary G. Yerkey, "U.S. to Oppose Bid to Exempt 'Culture' from OECD Investment Accord," *BNA Intl. Business & Finance Daily* (May 23, 1995).
44. For example, U.S. bilateral investment treaties (BITs) do not apply national treatment principles to air transportation, ocean and coastal shipping, banking, insurance, government grants, government insurance and loan programs, energy and power production, custom house brokers, ownership of real property, ownership and operation of broadcast or common carrier radio and television stations, ownership of shares in the Communications satellite Corporation, common carrier telephone and telegraph services, submarine cable services, use of land and natural resources, mining on the public domain, primary dealership in U.S. government securities, and maritime or maritime-related services. Nor do U.S. BITs apply MFN status to mining on the public domain, maritime or maritime-related services, primary dealership in U.S. government securities, and ownership of real property. See, e.g., Annex to the Russian Federation - United States Treaty Concerning the Encouragement and Reciprocal Protection of Investment, 31 I.L.M. 794 (1992); Protocol to United States - Argentina Treaty Concerning the Reciprocal Encouragement and Protection of Investment, 31 I.L.M. 124 (1992).
45. United States Federal Government paper, "Multilateral Agreement on Investment" 4 (1996).
46. Working Group C, in *OECD Documents* 148-149.
47. See European Commission, *Report on United States Barriers to Trade and Investment - 1994* (Brussels, April 1994); see also *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298, 114 S. Ct. 2268 (1994).
48. MAI Negotiating Group. Draft Agenda for September and October 1996 (June 2, 1996); OECD, *Main Features of the MAI* ¶ 102.
49. See Robert Couzin, *Tax Policy Forum: Taxation and the Multilateral Agreement on Investment*, 12 Tax Notes Int'l. 2049, 2051 (1966).
51. See Mark Shapiro, *The Dormant Commerce Clause: A Limit on Alien Land Laws*, 20 Brook. J. Int'l. L. 217 (1993).
52. R.R.S. Neb. § 76-406 (1995). The Nebraska Constitution reserves the right to regulate alien "acquisition, enjoyment and descent of property ..." NE Const. Art. I, § 25.
53. 60 Okl. Stat. §§ 121- 123 (1995); Okl. Const. Art. XXII, § 1 (1995). Nor does Oklahoma allow an alien to transfer land to another alien in order to avoid other alien land laws. 60 Okl. Stat. § 124.
54. Ind. Code Ann. § 32-1-8-2 (1996).

55. Neb. Rev. Stat. §§ 72-234.01-.02, 76-402-403, 76-405 to 407, and 76-410 to 415 (1995).
56. Nebraska allows a nonresident heir of land to request sale of the land in order to receive the net proceeds of sale. Neb. Rev. Stat Ann. §§ 76-408 and 409 (1995).
57. Kentucky gives a nonresident alien eight years to sell land, after which the state assumes title to the land. Ky. Rev. Stat. Ann. § 381.300 (Banks-Baldwin 1996).
58. Mississippi allows nonresident aliens to own up to five acres of residential land and 320 acres of industrial land. The state assumes title to land that is not in compliance with the law. Miss. Code. Ann. § 89-1-23 (1995).
59. Wisconsin limits nonresident aliens to 640 acres of land except to secure repayment of a debt. Wis. Stat. Ann. § 710.02(1) (West 1995).
60. S.D. Codified Laws Ann. § 43-2A-2 to 43-2A-7.
61. 60 Okl. Stat. §§ 121- 123 (1995); Okl. Const. Art. XXII, § 1 (1995).
62. Colo. Rev. Stat. § 36-1-124 (1990).
63. R.R.S. Neb. §§ 76-402, 76-403, 76-405, 76-406 (1995).
64. Mo. Rev. Stat. § 442.571(1)(West 1995).
65. 1996 Minn. A.L.S. 315.
66. N.D. Cent. Code § 47-10.1-02 (1995).
67. Minn. Stat. Ann. § 500.221 (West 1966).
68. Iowa Code Ann. § 567.3(1) (West 1995).
69. Pennsylvania limits nonresident aliens to 100 acres of land unless the land is inherited or held as security for a loan. A resident alien who moves out of the state or a nonresident alien who inherits land must dispose of the land within three years. After three years, the state may take title to the land. 68 Pa. Cons. Stat. Ann. §§ 41, 43, 44 and 46 (West 1996).
70. Ariz. Rev. Stat. Ann. §§ 37-610.02 (1995).
71. Colo. Rev. Stat. § 36-1-124 (1990).
72. Mont. Code. Ann. §§ 77-2-306, 77-2-334.
73. Or. Rev. Stat. § 273.255 (1995).
74. Nev. Rev. Stat. § 517.010 (1995).
75. Or. Rev. Stat. §§ 543.050 and 543.260 (1995).
76. Alaska Stat. § 42.20.010 (1995).
77. Haw. Rev. Code Ann. § 269-17.5 (1995).
78. Ga. Code § 46-5-141.
79. Opinion of Attorney General No. 80-21 (South Dakota).
80. Cal. Fish & Game Code § 8230(b)(4) (1996).
81. Wash. Rev. Code Ann. § 75.28.720 (1995).
82. Alaska Stat. § 16.43.160(b) (1995).
83. Cal. Fish & Game Code § 7852(b) and (d) (1996).
84. Or. Rev. Stat. § 508.285 (1995).
85. Md. Code Ann., Nat. Res. §§ 4-11A-09, 4-11A-05.
86. Mass. Gen. L. ch. 130, § 38.
87. Cal. Health & Safety Code § 18045.5 (1995) (distributors of mobile homes, manufactured housing or commercial coaches).
88. Haw. Rev. Code Ann. § 444-14; (construction companies).

89. Idaho Code §§ 61-302 and 61-503 (1995) (utility companies).
90. Mont. Code Ann. § 69-3-202(4) (1995) (utility companies).
91. N.D. Com. Code § 10-22-08 (1995) (all foreign corporations).
92. Or. Rev. Stat. § 541.700 (1995).
93. Mont. Code Ann. §§ 80-3-302, 80-3-314, 80-3-321.
94. Alaska Stat. § 43.35.030 (1995).
95. N.D. Admin. Code § 99-01-20-03, 05 (1995).
96. Or. Rev. Stat. § 461.215 (1995).
97. Neb. Rev. Stat. § 9-614 (1995).
98. S.D. Codified Laws Ann. §§ 42-7A-43 and 42-7B-25 (1995).
99. Tex. Rev. Civ. Stat. Ann. art. 179e, § 6.06(a)(12),(b),(d); Tex. Admin. Code tit. 16, § 301.1 *et seq.* § 305.102 (1995).
100. N.D. Admin. Code § 69.5-01-05-16 (1995).
101. OECD, *Main Features of the MAI* ¶ 101.
102. Wash. Rev. Code Ann. § 30.04.230 (West 1986 Supp.).
103. Iowa Code § 524.1909 (West 1996).
104. Minn. Stat. § 48.93 (West Supp. 1987).
105. Me. Rev. Stat Ann. tit. 10, § 1011 (1987 Supp.).
106. Survey by the Center for Policy Alternatives (1995).
107. Ariz. Rev. Stat. Ann. § 6-327 (1996).
108. N.M. Stat. Ann. § 58-12-2(e)(f) and § 58-15-5 (1996).
109. Iowa Code § 12C.6A (West 1996).
110. Ohio Rev. Code Ann. § 1111.03 (Baldwin 1996).
111. 7 Pa. Cons. Stat. Ann. §6020.150 (1996).
112. Gizette Canegeta and Robert Stumberg, *Community Banking Incentives* (Center for Policy Alternatives, 1993). This report is based on a survey of state treasurers and their operating programs, which are not necessarily created by statute.
113. Alaska Stat. § 38.05.045, § 38.05.135, § 38.05.140, § 38.05.185, and § 38.05.190 (1995).
114. Mont. Code Ann. § 77-3-305A (1975).
115. Ariz. Rev. Stat. Ann. §§ 37-610.02, 37-306 (1995).
116. Ariz. Comp. Admin. R. & Regs. 12-5-503, 12-5-515, 12-5-705(B), 12-5-801(c), 12-5-1101(1), 12-5-2102; Ariz. Rev. Stat. Ann § 37-291(A).
117. Ariz. Comp. Admin. R. & Regs. § 12-5-1001.
118. Haw. Rev. Code Ann. s.171-68 and 171-74
119. Utah Code Ann. § 73-3-2(1)(a) (1995).
120. Wyo. Stat. §§ 36-3-102(b), 36-6-101(a) - 36-6-101(c) (1995); State of Wyoming board of Land commissioners and Wyoming Farm Loan board rules and Regulations governing Leasing of Sub-Surface Resources, Ch. 6, §§ 5, 13(b) (effective March 1, 1982), Ch. 7, §§ 3(c), 7.
121. Or. Rev. Stat. § 273.825 (1995).
122. Wyo. Stat. § 36-5-105(a) (1996).
123. Idaho Code § 58-1004 (1995).
124. Or. Const. art. VIII, § 7 (1995).

125. OECD, *Main Features of the MAI* ¶ 14.
126. OECD, *Main Features of the MAI* ¶ 44.
127. Surface Mining Control and Reclamation Act. 30 U.S.C.S. § 1230 - 1265 (1966).
128. *See generally* Rev. Code Wash. 35.63 (Planning Commissions); Department of Ecology, *Model Ordinance* (1990).
129. Seattle Audubon Society and Washington Wetlands Network (WETNET), *Wetnet Citizen's Report: Local Wetland Protection in Puget Sound* (December 1994) 49.
130. California Coastal Act, Cal. Public Res. Code, § 30240 (1996).
131. California Coastal Act, Cal. Public Res. Code, § 30241 (1996).
132. California Coastal Act, Cal. Public Res. Code, § 30250 (1996).
133. *See* Chesapeake Bay Foundation, *Wetlands Permitting Programs in the Chesapeake Bay Area* (October 1994), App. C.
134. Md. Code Ann., Envir., § 5-901 *et. seq.*
135. Wash. Rev. Code Ann. § 43.21A.21A.705 (West 1966); *see* Pasha Publications, *Energy Report* (no. 46, vol. 24; November 25, 1996).
136. The International Association of Independent Tanker Owners (Intertanko) v. Lowry, 1996 WL 691968 (W.D. Wash).
137. California is reportedly considering preventive oil spill legislation. Sandi Doughton, "9th Circuit Court Gets Appeal of State's Strict Oil-Spill Rules," *The News Tribune* (January 11, 1997) B3. New York has a bill pending. 1997 NY S.B. 144 (Senator Skelos).
138. Cal. Rev. & Tax Code § 24356.7 (1996).
139. Or. Rev. Stat. § 315.311.
140. Wash. Rev. Code Ann. § 82.34.050 (West 1996).
141. Az. Rev. Stat. § 35-806 (1996).
142. Col. Rev. Stat. Ann. § 25-7-106.9 (1996).
143. *See, e.g.,* J. Christopher Thomas, *The Future: The Impact of Environmental Regulations on Trade* 18 Canada-U.S. L.J. 389-90 (1992).
144. *See* United States International Trade Commission, *Newsprint* (USITC Publication 2551, November 1992); 1992 ITC Lexis 651, *14.
145. The 13 states include Arizona, California, Connecticut, Florida, Illinois, Maryland, Michigan, Missouri, North Carolina, Oregon, Texas, West Virginia, and Wisconsin. For a current report, *see* Ramond Communications, *State Recycling Laws Update*, Year-End Edition 9 (1995).
146. The 29 states include Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Wisconsin and Wyoming. For a current report, *see* Ramond Communications, *State Recycling Laws Update*, Year-End Edition (1995).
147. Cal. Pub. Res., § 42756 and § 42760 (1995).
148. Or. Rev. Stat. § 459A.505.
149. Conn. Gen. Stat. § 22a-256n.
150. Cal. Pub. Res., § 14549 (1995).
151. Wis. Stat. § 100.297 (1994).
152. Cal. Rev. & Tax Code § 17052.14.
153. Mich. Comp. Laws Ann. § 18.1261a.
154. Cal. Pub. Cont. § 12205 (1995).

155. Tex. Govt. Code § 2155.448 (1995). Recycled newsprint, plastic, and glass laws appear to be effective in influencing investment decisions. In 1989 there was only one Canadian paper mill that could process recycled paper; today there are 23. Paul Bagnell, "Recycled Paper Running Short: Pulp and paper makers urge Canadians to recycle more so they can stop importing so much from the U.S.," *Financial Post* (October 31, 1996). Other Canadian companies have shifted their capital investment in production into the United States, prompting a company executive to complain that "recycled-content laws have single-handedly changed the economics of location of the industry." Geoffrey Elliot, vice-president of corporate affairs for Noranda Forest, Inc., quoted in BNA, "Countries Can't Use Trade to Promote Environmental Action, Conference Told," *BNA International Trade reporter* (May 20, 1992). Canada officially cites state-level recycled content laws as a leading trade barrier in the U.S. market. Canadian International Trade Ministry, *1995 Register of United States Barriers to Trade* (April 1995); BNA, "U.S. Barriers Still in Place, Says 1995 Canadian Register" *BNA International Trade Reporter* (April 5, 1995). Similarly, the EU complains that the application of state recycled-content policy to "imported products is not in conformity with GATT rules." European Commission, *Report on United States Barriers to Trade and Investment* 57 (1994).
156. Working Group B, in *OECD Documents* 131. For a summary of the domestic debate on incentives, see Schweke *et al.*, *Bidding for Business*; Corporation for Enterprise Development, "Making Development Incentives More Accountable," in *Improving Your Business Climate*, (forthcoming, 1997) [hereafter, CfED, *Improving Your Business Climate*]; and National Council for Urban Economic Development, *Incentives: A Guide to an Effective and Equitable Policy*, (Washington, D.C., 1996) [hereafter, NCUED, *Incentives*].
157. Working Group B, in *OECD Documents* 131.
158. OECD, *Main Features of the MAI* ¶ 55; Anders Ahnliid, *The Multilateral Agreement on Investment: Special Topics* (OECD, December 1996, <http://www.oecd.org/daf/cmisa/ahnliid.htm>) ¶ 4. Mr. Ahnliid chairs the MAI Expert Group 3.
159. KPMG Peat Marwick Business Incentives Survey and Press Release, Fall 1995.
160. Schweke *et al.*, *Bidding for Business* 18.
161. Or. Rev. Stat. §§ 285.597, 285.600 and 285.605 (1996).
162. Haw. Rev. Code Ann. § 39A-84 (West 1996).
163. N.D. Cent. Code § 40-57.1-04 (West 1996).
164. Schweke *et al.*, *Bidding for Business* 18.
165. N.D. Cent. Code. § 40-57.1-04.3 (1995).
166. Wash. Rev. Code Ann. § 82.08.02565 (1966).
167. Tx. Const. Art. 8 § 1-j (West 1966).
168. Schweke, *et al.*, *Bidding for Business* 18.
169. Wash. Rev. Code Ann. §§ 82.04.435 and 82.08.02565 (West 1996).
170. Cal. Rev. & Tax Code § 6377 (1996).
171. Tx. Civ. Stat. Art. 5190.6 (West 1996).
172. Schweke *et al.*, *Bidding for Business* 19 and National Association of State Development Agencies (NASDA), *Directory of Incentives for Business Investment and Development in the United States* (Urban Institute Press, 3rd edition, 1991) [hereafter, NASDA, *Directory of Incentives*].
173. NASDA, *Directory of Incentives*.
174. NASDA, *Directory of Incentives*.
175. Haw. Rev. Code Ann. § 163D-17 (West 1996).
176. NASDA, *Directory of Incentives*.
177. Tex. Const., art. XVI, § 70(g) (1988).
178. Col. Rev. Stat. Ann. §§ 29-4-709 and 710.6 (1994).
179. GATT 1994 Agreement on Subsidies and Countervailing Measures Art. 8.2(b).
180. OECD, *Main Features of the MAI* ¶ 60; see Working Group B, in *OECD Documents* 131-133.

181. Tex. Gov. Code § 2303.402 (1996).
182. Cal. Gov. Code § 7079 (1996).
183. Or. Rev. Stat. §§ 285.597, 285.600 and 285.605 (1996).
184. Mont. Code Ann. § 15-31-123.
185. 74 Okl. Stat. Ann. § 5063.23 (West 1996).
186. 18 Okl. Stat. Ann. § 903 (West 1996).
187. Ariz. Rev. Stat. § 41-1505.07.
188. Jeremy Brecher, *Countering Corporate Downsizing: A Survey of Proposals to Halt Layoffs and Job Degradation* (Washington, D.C.: Preamble, 1996); Greg Leroy, *No More Candy Store: States and Cities Making Job Subsidies Accountable* (Chicago: Federation for Industrial Retention and Renewal, 1989).
189. OECD, *Main Features of the MAI* ¶¶ 44-45; Working Group B, in *OECD Documents* 129.
190. Working Group C, in *OECD Documents* 142-143.
191. Ariz. Rev. Stat. § 41-1505.07(H) (1995).
192. Conn. Gen. Stat. Ann. § 32-5a and § 32-223 (1995).
193. Iowa administrative statute 261-22.7(2)(a)-(b).
194. NAFTA Art. 1106.4.
195. See, e.g., European Commission, *Report on United States Barriers to Trade and Investment* (Brussels 1994) 36-37; Canada, Dept. of Foreign Affairs and International Trade, *Register of United States Barriers to Trade* (Ottawa 1996) 13; Japan, Subcommittee on Unfair Trade Policies and Measures, Industrial Structure Council, *Report on Unfair Trade Policies* (Tokyo 1994) 19.
196. OECD, *Main Features of the MAI* ¶ 51.
197. NAFTA Art. 1106.1 and 1106.3.
198. AGP Art. XXIII.
199. General Notes, United States Appendix to the Agreement on Government Procurement, ¶ 1; AGP, United States Notes to Annex 2, ¶¶ 2 and 3.
200. AGP, Annex 2 reservations for individual states include Hawaii (software developed in the state and construction), Kansas (construction, automobiles and aircraft), Kentucky (construction), Mississippi (services generally), New York (transit cars, buses and related equipment), Oklahoma (construction), South Dakota (beef), Tennessee (construction and services generally), and Washington (fuel, paper products, boats, ships and vessels).
201. OECD, *Main Features of the MAI* ¶ 84.
202. NAFTA art. 1121.1
203. 19 U.S.C. 3312(b) and (c).
204. 19 U.S.C. 3312, 3512 (1996).
205. OECD, *Main Features of the MAI* ¶ 79.
206. 19 U.S.C. 3312(b)(1).
207. The 11th Amendment to the U.S. Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by citizens or Subjects of any Foreign State."
208. *Seminole Tribe of Florida v. Florida et al.*, 116 S. Ct. 114, 1996 U.S. Lexis 2165, at *36 (decided March 27, 1996) overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 105 S. Ct. 2273 (1989).
209. *Seminole Tribe of Florida v. Florida*, 1996 U.S. Lexis at 2165, at *47; citing *Ex parte Young*, 209 U.S. 123, 714 S. Ct. 441 (1908).
210. 19 U.S.C. 3312(a) (NAFTA); 19 U.S.C. 3512(a) (Uruguay Round of GATT).

211. OECD, *Main Features of the MAI* ¶ 79.
 212. U.S. Const., Art. II, § 1. See Robert P. Deyling, *Free Trade Agreements and the Federal Courts: Emerging Issues*, 27 St. Mary's L.J. 353, 366-67 (1996); Demetrios G. Metropoulos, *Constitutional Dimensions of the North American Free Trade Agreement*, 27 Cornell Int'l L.J. 141, 159-71 (1994); Patricia Kelmar, *Binational Panels of the Canada-United States Free Trade Agreement in Action: The Constitutional Challenge Continues*, 27 Geo. Was. J. Int'l L. & Economy. 173, 190-95 (1993); Jim C. Chen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review under the United States - Canada Free-Trade Agreement*, 49 Wash. & Lee L. Rev. 1455, 1463-79 (1992).
 213. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).
 214. U.S. Const., Art II, § 2, cl. 2. See Jim C. Cohen, *Appointments with Disaster: The Unconstitutionality of Binational Arbitral Review under the United States - Canada Free-Trade Agreement*, 49 Wash. & Lee L.Rev. 1455, 1479-96 (1992); Alan Morrison, *Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement*, 49 Wash. & Lee L.Rev. 1299 (1992).
 213. United States Federal Government paper, "Multilateral Agreement on Investment" 6 (1996).
 214. United States Federal Government paper, "Multilateral Agreement on Investment" 4 (1996). During NAFTA, months of work by state and federal agencies resulted in the listing of hundreds of country- and state-specific reservations. In the end, these reservations were so inconsistent that the USTR simply decided to reserve all existing state laws (as of January 1, 1994). However, these reservations served merely as a "grandfathering" mechanism to avoid conflicts with existing laws. They did not preserve the right of states to enact new laws in the reserved policy areas. The OECD considers this freezing of future lawmaking, or standstill, to be a minimum constraint for accepting country-specific exceptions in the MAI. Going further, MAI negotiators have also proposed a rollback of laws protected by country-specific exceptions to ensure that these laws are covered by the MAI after a certain period of time. OECD, *Main Features of the MAI* ¶¶ 64-65; Working Group A, in *OECD Documents* 119.
 215. As an example of the need for consultation, the EU wants the right to maintain and alter its internal investment preferences without extending them to all other members of the MAI. The EU's arguments support state interest in retaining diversity in their investment preferences, yet the U.S. federal government opposes the EU position, arguing that it violates national treatment and would hamper the entry of American investors into European markets (United States Federal Government paper, "Multilateral Agreement on Investment" 3 (1996).
- Advocacy by WGA and other state organizations significantly strengthened state protections in legislation for NAFTA and the WTO. See Orbuch, Paul and Thomas Singer, "International Trade, the Environment, and the States: An Evolving State-Federal Relationship," *The Journal of Environment and Development*, Vol. 4, no. 2 (Summer 1995). However, it took concerted action by governors, attorneys general, tax administrators and legislators to persuade USTR on only a few of the many safeguards that were proposed. The most active groups included the National Association of Attorneys General (NAAG), the National Conference of State Legislatures (NCSL), the Multistate Tax Commission (MTC), and the Federation of State Tax Administrators. Correspondence on file from July through November 1995. For an analysis of all of the state and local proposals for GATT 1994 implementing legislation, see Carter Pilcher, *Comparative Analysis of State Sovereignty Protections in the Uruguay Round Agreements Act* (Harrison Institute for Public Law, Georgetown University Law Center, August 1995).
216. European Commission, *Report on United States Barriers to Trade and Investment - 1994* (Brussels, April 1994) 9.