OECD INSTRUMENTS FOR PROMOTING THE LIBERALISATION OF FOREIGN DIRECT INVESTMENT

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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OECD INSTRUMENTS FOR PROMOTING THE LIBERALISATION OF FOREIGN DIRECT INVESTMENT

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I. Introduction

One of the primary objectives of the OECD, is to help its Member countries to liberalise international trade in goods and services and progressively establish a system of free capital movements. To achieve this task, the Organisation has at its disposal wide-ranging instruments for co-operation. These instruments embody important commitments entered into by Member countries for facilitating what is one of the major components in international economic relations, namely foreign direct investment.

This co-operation has developed around two main pillars: the Codes of Liberalisation of Capital Movements and of Current Invisible Operations, and the National Treatment instrument, which is an integral part of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises. While these instruments do not have the same origin and scope, taken together they cover all direct investment transactions, whether by non-resident enterprises or by established enterprises under foreign control. Their two fundamental principles -- right of establishment and national treatment -- and the corresponding procedures comprise the strictest and most detailed multilateral rules in force today on the international scene. These principles and procedures have served as a framework for Member countries’ efforts over the past ten years to remove controls and obstacles to foreign direct investment. They have also contributed to the substantial progress in achieving liberalisation of such investment.

This brochure highlights the salient features of these OECD instruments, briefly recounting their history and accomplishments, explaining how they work and interact and giving a general idea of what might be done, in the light of past experience, to remove the remaining restrictions on foreign direct investment.

* The following text is an excerpt from chapter 4 of Foreign Direct Investment, Tendencies and Policies Over the Years, OCDE 1992.
II. Principles and Procedures

While the provisions relating to direct investment in the Codes of Liberalisation and the National Treatment instrument supplement one another, their operational scope and procedures are different. The Codes have the legal status of OECD Council Decisions binding on all Member countries, whereas the National Treatment instrument expresses a policy commitment on their part. The Codes, although they deal only with transactions between residents and non-residents, cover both capital movements and current invisible operations. Obligations under the Capital Movements Code concern both inward and outward investment. The National Treatment instrument, though dealing only with resident foreign-controlled enterprises, forms part of a broader strategy of international investment co-operation that also comprises the Guidelines for Multinational Enterprises, provisions relating to International Investment Incentives and Disincentives and an agreement on Conflicting Requirements, within the compass of the 1976 Declaration and accompanying Decisions on International Investment and Multinational Enterprises. (1)

Whatever the differences, the commitments by OECD Member countries regarding international direct investment are based on similar, broadly complementary principles and procedures. Investment measures and practices are, moreover, much the same for non-resident enterprises and established enterprises under foreign control. Future work on building up and combining the strengths of the OECD instruments is likely to smooth out the differences even further.

Fundamental principles

Right of establishment and investment

The two Codes of Liberalisation, adopted in 1961 just after the OECD was founded, pioneered the codifying of international investment rules. Since 1964 the signatories of the Code of Liberalisation of Capital Movements were under the obligation progressively to liberalise inward and outward direct investment to the extent necessary for effective economic co-operation (2). The investment in question referred to capital transfers among Member countries for the purpose of establishing lasting economic relations with an undertaking and/or giving the possibility of exercising an effective influence on its management. The type of investment included the creation or extension of a wholly-owned enterprise, a subsidiary or branch, the acquisition of full ownership of an existing enterprise, participation in a new or existing enterprise or a long-term loan (five years and longer).

The Code of Liberalisation of Current Invisible Operations for its part introduced the notion of "equivalent treatment" concerning direct investment by insurance companies in the form of branches or agencies, the purpose being to take account of the latter’s’ peculiar legal status and put them on an equal footing, where financial obligations were concerned, with domestically-owned insurance companies. Following this principle, the authorities may apply different rules to the branches of non-resident enterprises provided that these rules do not weigh more heavily on them than the corresponding rules do on domestic enterprises. In 1989, when more extensive obligations under the Codes were adopted, the notion was enlarged to cover branches of all financial institutions, namely branches of banking and financial institutions in addition to branches of insurance companies.

The Code of Liberalisation of Capital Movements provided also for free transfer of capital following liquidation of assets and for obtaining finance in the form of long-term loans. Current transfers
(profits, dividends, interest payments, etc.) were liberalised under the Code of Liberalisation of Current Invisible Operations.

In April 1984, a breakthrough occurred when the OECD Council adopted an expanded definition of inward direct investment that included the main features of the right of establishment. At a stroke, a wide variety of restrictions on foreign investment became unambiguously subject to liberalisation obligations for the first time. Under the amendment to Item I/A of the Code, Member countries were required not to introduce or maintain regulations or practices that raised special barriers to non-resident as compared with resident investors (3). The measures and practices covered by this basic right to establishment and investment include: licenses, concessions and similar authorisations, as well as conditions and requirements for running an enterprise, ceilings on non-resident holdings in resident enterprises, and restrictions on the operating mode (subsidiary, branch, agency or other).

The new addition to the Code was not, of course, intended to accord non-resident investors better treatment than residents. It was again made clear in 1984 that investors may not avail themselves of the right to exercise an economic activity without obeying the general regulations of the Member country concerned. The addition excluded application of the Code to the right of foreign individuals to settle or work in a Member country and to laws, regulations and other measures governing public, private or mixed monopolies. Regarding monopolies, where one or several enterprises cover entire sectors of the economy, it was decided that they should be considered as part of a country’s general economic system and thus not covered by the right of establishment.

**National treatment for established foreign-controlled enterprises**

While "National Treatment” is a key principle of the OECD liberalisation instruments, it was first defined by the National Treatment instrument adopted in 1976 and applying only to already-established enterprises (4). Under the instrument, Member countries agreed that they should treat foreign-owned or foreign-controlled firms operating within their territories no less favourably than similarly situated domestic firms. The principal measures and practices covered by this commitment were grouped under five main headings: investments by established foreign-controlled enterprises, official aids and subsidies, tax obligations, government purchasing and access to local bank credit and the capital market.

Monopolies remain outside the scope of the National Treatment instrument. However, National Treatment applies once their activities are opened to competition. In this case, access to the sector concerned should be granted on a non-discriminatory basis to both private domestic firms of the relevant Member country and already-established foreign-controlled firms. The same rule applies to the Codes of Liberalisation following the initial operation of demonopolisation.

In the course of time, the form and scope of the Codes and the National Treatment instrument have been improved for the sake of transparency and to avoid an overlap between the commitments of the two instruments. According to the clarification agreed by the CMIT and CIME in 1990, all investments by non-resident firms, whether in the form of subsidiaries or "direct" branches fall under the inward direct investment provisions of the Codes. This made it clear that subsequent investments by such "direct branches" are covered by the Codes. However, investments by subsidiaries already incorporated under the law of a Member country, as those of their branches, are subject to the field of application of the National
Treatment instrument. As to other measures, they are a matter for the commitments under National Treatment alone.

Non-discrimination

Another essential feature of the liberalisation instruments is the principle of non-discrimination, as expressed in the Member countries’ commitment to apply liberalisation measures, and restrictions, without discrimination.

In the case of the Codes, this obligation means that a Member country not in a position to liberalise continues to receive the economic advantages of liberalisation by other Members. Only Members forming part of a special customs or monetary system may, under Article 10 of the Codes, apply to one another additional measures of liberalisation without extending them to other Members of the OECD.

A Decision of the Organisation in July 1986, reproduced in Annex E of the Code of Capital Movements, made it possible, subject to certain conditions, to maintain, in the area of inward direct investment and establishment reciprocity requirements (i.e. whereby a Member country allowed residents of another Member country to invest or become established under similar terms to those applied to its residents by the other Member country) and/or measures and practices which resulted in discrimination against investors from different OECD Member countries (apart from the special provisions of customs or monetary systems). It was considered that these reciprocity requirements and/or measures and practices were not on the same footing as restrictions.

It was noted that reciprocity has come to be used in recent years by a number of Member countries to facilitate the establishment of their enterprises in foreign markets, notably in the banking and financial services sector. Although it was recognised that this type of measure may have contributed, in certain cases, to widen the effective sphere of liberalisation, it was also felt that it could limit its scope. In adopting the 1986 Decision, the OECD Council accordingly reiterated its attachment to the non-discriminatory principle. It also stated that reciprocity measures needed to be notified to and regularly examined by the Organisation with a view to their eventual elimination.

The National Treatment instrument has no specific clause bearing on this point although it is understood that reciprocity measures constitute exceptions to the instrument. Moreover, the introduction of new reciprocity measures would be contrary to the standstill on National Treatment Measures reached by the OECD in 1988 (5).

The 1991 Review of the OECD Declaration and Decisions on International Investment and Multinational Enterprises, also, give Member countries the opportunity to restate their attachment to the principle of non-discrimination. Member countries indicated that reciprocity requirements were a continuing cause of concern, since they ultimately conflict with a multilateral approach to liberalisation.

Progressive liberalisation

The notion of progressive liberalisation is the driving force behind the OECD international investment instruments. Both in the Codes and the National Treatment instrument it is taken to mean the
gradual elimination of official measures and practices that run counter to achieving the fundamental goals of these instruments. But there is an important difference here between the Codes and the National Treatment instrument. Whereas the obligation in the Codes is a legal one -- Member countries are required to take the necessary steps to attain liberalisation objectives -- in the National Treatment instrument, it is viewed as a "political commitment". The distinction is also found in the "irreversibility" of liberalisation achieved under the Codes while, under the instrument, "exceptions" to National Treatment may in theory be introduced or reintroduced. Nevertheless, Member countries have recently reiterated their support to the understanding reached in November 1988, pursuant to which, it was particularly important that, until the adoption of a new reinforced National Treatment instrument, Member countries avoid the introduction of new measures or practices which constitute exceptions to the present instrument. In fact, one important objective for such a new instrument would be to move towards a binding obligation in this field.

The notion of progressive liberalisation cannot, however, stand in the way of measures taken by Member Countries to maintain public order and protect essential security interests. Member countries are also entitled to verify the genuineness of transactions and transfers in order to thwart breaches of their laws and regulations. Measures to that effect are nevertheless carefully scrutinised to avoid their being abused, i.e. used in such a way as to frustrate the liberalisation objectives of the instruments. It is for this reason that the procedures for examining these measures have been considerably reinforced.

Member countries also committed themselves to seeing that OECD obligations under these instruments were respected at every level of the administration. While it is true that the Capital Movements Code contains special provisions recognising the limits of federal power in Canada and the United States to dispose of certain matters within the purview of the Code, foreign investment in particular, it was agreed in 1984 that all measures taken at whatever level of the administration in regard to inward and outward direct investment and establishment would become subject to the Code notification and examination procedures regardless of the level of government at which those measures are imposed. The Member country concerned is expected to draw the Code obligations and the views of the CMIT to the attention of the subnational authorities concerned and to encourage their compliance with the obligations of the Code. A similar procedure has been adopted in 1989, for banking and financial services upon the enlargement of the Code of Current Invisible Operations to these services, and in 1992, for insurance services in the context of the sixth examination of reservations relating to the insurance items of the same Code. The understanding also required of all Member countries that they take action, when advised of restrictive measures practised by a subnational unit of government, to annul these measures and encourage stricter compliance with the obligations of the Codes.

As time has passed, the provisions of the National Treatment instrument relating to measures and practices of subnational units have been refined. The Declaration of 1976 on International Investment and Multinational Enterprises included general commitment to grant National Treatment to foreign-controlled enterprises operating within the territories of Member countries. It was further understood that Member countries with territorial subdivisions with non-subordinated powers endeavour to ensure that their territorial subdivisions apply National Treatment. As from the adoption of the Third Revised Decision on National Treatment, the (strengthened) notification and examination obligations applied to all Member countries, regardless of whether measures were taken at territorial subdivision or central government level. (See also the section below on procedures.)

Lastly, it may be noted that the provisions of the OECD instruments are applicable to the OECD area only. The Codes and the National Treatment instrument nonetheless encourage Member countries to
extend measures of liberalisation to all members of the International Monetary Fund (in the case of the former) and countries other than Member countries (in the case of the latter).

**Reservations, exceptions and derogations**

As the achievement of the liberalisation objectives of the OECD instruments is conceived as being "progressive", Member countries not in a position to remove all their restrictions immediately may lodge "reservations", in the case of the Codes of Liberalisation, and "exceptions", in the case of the National Treatment instrument.

With respect to the Codes, and more especially Item I of the Capital Movements Code on direct investment, reservations are allowed at the time of adhering to the Codes, when certain obligations come into force or when new obligations are added to the Code. In lodging a reservation, the Member country must inform the Organisation of the reasons for it and undergo a regular examination of reservations not withdrawn. Moreover, a reservation once withdrawn may not be reintroduced. The Codes exercise a ratchet effect, preserving liberalisation already attained and constantly encouraging rollback of remaining reservations.

All Member countries, except for Luxembourg, currently have reservations concerning the Capital Movements Code’s obligations on inward direct investment. In every case, however, the reservations are limited to certain investments and/or sectors, usually connected with services. On several occasions over the past few years, the scope of the reservations has been narrowed, illustrating the progress made on the liberalisation front. Some of the reservations still maintained by Member countries are, in fact, extremely limited in scope. Nineteen Member countries (all, that is, except the Luxembourg, Ireland, Mexico, New Zealand, Portugal and Sweden) have notified measures of reciprocity under Annex E of the Capital Movements Code.

The Codes also provide for "derogations" applicable to Member countries experiencing temporary difficulties in preserving the freedom of operations not covered by reservations, because of, say, a seriously deteriorating balance of payments situation or the danger of grave economic or financial disturbance. In either case, the Member must promptly notify the Organisation and provide a justification for invoking the derogation procedure. Derogations are periodically re-examined to make sure that they are not being maintained for an unduly long period of time. The value of this "safety valve" lies in enabling Member countries in difficulty to remain party to the Codes and not lose sight of the ultimate goal of liberalisation. They also enable these countries to continue to benefit from liberalisation measures taken by other Member countries. No Member country is at present invoking a derogation concerning foreign direct investment.

Where direct investment is concerned, the Capital Movements Code further provides for suspending the obligation to liberalise where, in view of the amount involved or other factors, a specific transaction or transfer would have an exceptionally detrimental effect on the interests of the Member concerned. This clause is intended for "exceptional" situations not covered by the clauses on public order and security mentioned above, or by a reservation or derogation, that is to say, because of particularly serious economic or financial difficulties. If and when such a situation arises, the Member would be required to notify the Organisation immediately of all restrictions imposed on direct investment so that the Organisation could check their compatibility with the Code.
The provisions of the National Treatment instrument in this connection are much less detailed. Measures departing from National Treatment simply give rise to "exceptions". No other form of derogation exists at the present time -- a consequence of the basic differences between the legal obligation in the Codes and the "policy commitment" in the National Treatment instrument already noted before. Notification of exceptions to National Treatment is, on the other hand, a strict obligation. While, on the legal plane, there is no ratchet effect exerted by the National Treatment instrument, the understanding reached in November 1988 in the CIME Committee on a standstill regarding measures contrary to National Treatment was motivated by a similar concern to protect progress in liberalisation. As part of that understanding, Members are also committed to avoid the introduction of new measures or practices constituting exceptions to National Treatment and to pay particular attention to this question (6).

All Member countries have notified exceptions to National Treatment. A large majority of these exceptions are in the category of "investments by established foreign-controlled enterprises" are concentrated in particular areas such as natural resources, transport and finance. Member countries’ reservations under item I/A of the Capital Movements Code for the most part concern services.

Procedures

The role of the Codes of Liberalisation and the National Treatment instrument in encouraging the lifting of restrictions on direct investment depends heavily on the procedures provided for the instruments’ implementation. These have been tested by years of experience. They provide a working framework for all the issues relating to the instruments: they promote transparency concerning the measures and practices dealt with by the instruments; they provide for regular examination of these measures and practices, for the framing of recommendations aimed at furthering liberalisation in Member countries and for strengthening and expanding the instruments’ provisions. These various tasks are entrusted to the Committee on Capital Movements and Invisible Transactions (CMIT) in the case of the Codes of Liberalisation, and to the Committee on International Investment and Multinational Enterprises (CIME) in the case of the National Treatment instrument.

Notification and transparency

The availability of reliable information is essential to the effective functioning of any co-operative instrument. Both the Codes of Liberalisation and the National Treatment instrument lay down specific obligations in this regard; on them depend all the other activities relating to the instruments.

Where the Codes are concerned, Members are required to notify the Organisation of all measures affecting position with regard to the instruments within 60 days of the measures’ adoption. Members must also notify the Organisation immediately if they invoke one of the derogation clauses in the Codes. In either case, Members must explain the reasons for their decisions and present a justification for restrictions which they wish to maintain; the same applies to the regular examinations of their reservations (see following section). Moreover, the CMIT Committee systematically monitors, new governmental measures affecting capital movements and current invisible transactions.

The provisions of the National Treatment instrument were developed in the same spirit. In accordance with the strengthened procedures of the Third Decision of the Council on National Treatment adopted on December 1991, Member countries must notify the Organisation of all measures constituting
exceptions to National Treatment and of all other measures having an effect on the implementation of this principle, within 60 days of their adoption or amendment. All exceptions to National Treatment in force at the date of the Revised Decision are supposed to be listed in an Annex to the Decision. This means that any change in this list, and especially any new exception, must be approved by the Council and not just by the CIME Committee as was formerly the case. In other words, although the National Treatment instrument does not constitute a legal barrier to the adoption of new measures contrary to national treatment, the strengthened implementation procedures of the Revised Decision make an important contribution to transparency and, where new departures from National Treatment are concerned, they act as a means of dissuasion at a high political level. The CIME Committee also has monitoring function in this field.

Lastly, any Member country is entitled under the Codes or the National Treatment instrument to apply to the Organisation if it considers that measures taken by another Member are prejudicial to it -- this does not, of course, exclude the possibility of bilateral discussions on the subject.

Examination

The periodic examination of restrictions which are the subject of reservations, derogations or exceptions is the prime tool of the OECD instruments. The procedure does not involve negotiations in the sense of an exchange in concessions. It is designed instead as an incentive mechanism, to induce the country being examined to advance and continue along the path of liberalisation. This approach reflects the general philosophy of the Organisation in this area pursuant to which liberalisation is in the interest of the country maintaining restrictions and, for this reason, may be implemented unilaterally or without counterparts. Country examinations are a process by which the performance of each Member can be judged by its peers, who may use the opportunity to make specific recommendations to the Member examined. The recommendations are followed up by the Organisation which can thus maintain constant pressure to liberalise on Member countries.

On the occasion of the 1991 Review of the OECD Declaration and Decisions on International Investment and Multinational Enterprises, it was decided that examinations of exceptions and of any other measure requiring notification under the National Treatment Instrument could also be carried out in future by country; in the past these examinations could only be conducted, because of national sensitivities, by categories of restriction imposed in Member countries as a whole. This opened the way for single examinations of all restrictions falling under the purview of the OECD investment instruments as the examinations under Item I/A of the Capital Movements Code were already conducted on a country-by-country basis. A Joint Working Group of the CMIT and CIME Committees was created in June 1992 and working methods were established drawing on the long-standing procedures of the CMIT for conducting country examinations under the Capital Movements Code.

These examinations are divided in three parts. The first part assesses the role of foreign direct investment in the economy of the country examined and its contribution to the country’s integration into the world economy. This is done by analysing available data such as on foreign investors’ share of employment, domestic output and capital formation, research and development, exports and imports, trade balance and capital account. Comparisons are made with other OECD countries to determine the country’s relative degree of foreign penetration and control, its position as an exporter and importer of equity capital and other special features. Historical trends are reviewed to determine growth patterns and turning points.
and the role they may have played in policy decisions concerning foreign direct investment. National foreign direct investment data are described in reference to the OECD Benchmark Definition on foreign direct investment (7). The authorities of the country examined are also asked about their perceptions of the main factors which influence foreign investment decisions in their country and their expectations about foreign investors’ future involvement.

The second part of the examination scrutinises the Member’s policies and the nature and relative importance of the various impediments to foreign direct investment. Attention is also directed at factors having a significant impact on the business environment even though they may not only affect foreign investment.

Measures of a cross-sectorial nature are discussed first, followed by sectorial restrictions. The main discriminatory measures reviewed at the horizontal level are screening mechanisms, performance requirements or discriminatory financial and tax policies. Measures affecting the general degree of market access include monopolies and concessions, the size of the public sector and state enterprises, privatisation, aid policies, government procurement and industrial policies. Attention is also given to corporate practices which may restrict foreign entry such as share restrictions, inter-firm arrangements, corporate governance and the basic features of the country’s competition policy. Sectoral restrictions are scrutinised too. The country examined is invited to explain the origin of the restrictions, the reasons for maintaining them and their effects on foreign investment. It is also called upon to comment on past liberalisation measures and/or the prospects for adopting new ones.

The last part of the examinations is devoted to the general assessment of the country’s foreign direct investment policies and the formulation of recommendations to its national authorities. Where liberalisation has already taken place, to country is invited to amend its position under the OECD instruments, that is with respect to its reservation to item I/A of the Capital Movements Code and/or its exceptions to the National Treatment instrument, to closely reflect its policies and practices. In the event that the authorities of the country are prepared to comply, a draft Decision is drawn up for approval, which gives legal effect to the changed position under these instruments. This contributes to the transparency of the remaining restrictions and forms the base upon which the "ratchet effect" is exercised.

Where the Joint Working Group and its parent Committees believe that further liberalisation should be considered, they may invite the Council to make Recommendations to the Member country. Measures that discriminate between investors from different OECD countries are a matter of particular concern because they are contrary to one of the basic principles of the Codes of Liberalisation. Liberalisation is also encouraged with respect to those restrictions that are not common in other Member countries or where liberalisation should be possible for the Member country concerned. Unlike Decisions, Council Recommendations are not binding in character. Nevertheless, they are made by the highest decision-making body of the Organisation. They represent the culmination of a long process of consultation and should be accepted by the Member country concerned. Experience shows that Recommendations and their follow-up act as an effective incentive to Member countries.

The joint examinations have proven to be a valuable and effective mechanism for promoting the liberalisation of foreign direct investment policies through the OECD instruments. They have provided for greater transparency and a more comprehensive view of the measures applied to foreign direct investment in the country examined and a better assessment of their effect. They have allowed for the formulation of Recommendations more tailored to the particular situation of that country. They have led to a better
understanding of how the Codes of Liberalisation and the National Treatment instrument interact and provided the means of combining their respective strengths. They have also increased the understanding of the major market access problems encountered by foreign investors, an essential step for the elaboration of more comprehensive disciplines on foreign direct investment (see section 3 below).

The results of the country examinations are published in a new OECD series entitled "OECD Reviews of Foreign Investment". FDI studies already published are Sweden (1993), New Zealand (1993), Portugal (1994), Ireland (1994), Greece (1994), and Italy (1994). The examinations of Denmark, the United States, Finland and Norway will be published during the first half of 1995.

The reservations to the Codes and the exceptions to National Treatment are regularly brought-up-to-date and published. In addition, both the CMIT and CIME Committees publish on occasion studies on Member country restrictions in particular sectors and a comprehensive listing of impediments to foreign direct investment (8).

Interpretation and strengthening of obligations

The CMIT and CIME Committees deal with all matters connected with the interpretation or application of the instruments for which they are responsible. They submit their conclusions to the Council where necessary.

It quite often happens that new government policy measures raise questions of interpretation. They may arise when the impact of those measures on the positions of the different Member countries is being discussed, or in the broader policy context. Both Committees have devoted special attention to the reciprocity requirements imposed on foreign firms, to moves by Member countries towards regional integration, and to measures intended to safeguard essential national security interests.

Considerable efforts have been deployed over the years by the two Committees to widen the scope of the OECD instruments relating to inward direct investment and ensure a coherent interpretation of Member countries in this area. Since the right of establishment was integrated into the Capital Movements Code in 1984, all the investment activities carried out by foreign firms are covered by the instruments. It has also been possible over time to make the respective fields of application and interaction of the instruments more precise. For instance, the CMIT and CIME Committees have clarified the circumstances under which branches fall under the purview of Liberalisation Codes and are covered by the National Treatment instrument.

Status of the Committees

The CIME Committee is made up of representatives of Member countries. The CMIT Committee, on the other hand, is the only permanent Committee of the Organisation made up of persons nominated by Member countries and appointed by the Council because of their competence. CMIT Committee members thus act as independent experts and do not engage the responsibility of the countries which nominated them. CMIT Committee decisions may be adopted by simple majority vote, with dissenting opinions set out in the reports communicated to the Council. The latter procedure is rarely used, although it may be necessary where consensus cannot be reached(9).
The Commission of the European Communities attend CMIT and CIME Committee meetings and take part in the Committees’ work. Representatives of the International Monetary Fund and the European Free Trade Association also attend CMIT Committee meetings.

In recent years, the committees have worked increasingly closer together because of the importance of foreign direct investment issues on their respective agendas. This has proved to be an efficient and effective means of monitoring new trends and policy developments, carrying out country examinations of policies on foreign investment, and exploring ways of strengthening the rules of the game.

III. Towards a New Multilateral Investment Agreement

During the 1980s, foreign direct investment was encouraged by substantially more open policies and strengthened rules of conduct in Member countries, reinforcing the general trend toward globalisation of industrial and commercial activity. In a world where protectionist reactions may return at any moment to threaten past advances, preserving these gains is a major objective. Ways of achieving further liberalisation also need to be explored.

At the OECD Ministerial meeting on 7-8 June 1994, the CIME and CMIT Committees submitted a report on the need for a new multilateral investment agreement and its possible content. Bilateral, regional and even sectoral agreements are being negotiated frequently, but there is no comprehensive multilateral agreement for foreign investment. On the basis of the recommendations of the two Committees, the 25 OECD Ministers asked the Organisation to enter a new phase of work aimed at elaborating a multilateral investment agreement, with a report to the Ministerial meeting in 1995.

Ministers recognised that only a broad investment instrument providing for a satisfactory balance of commitments between countries can attract the necessary support. Such an agreement could provide legally binding rules to ensure equal competitive opportunities for domestic and foreign investors and stable and consistent treatment of foreign direct investment. It could seek high standards of liberalisation and investment protection that are appropriate to all countries. And it could contain an effective mechanism to settle disputes between contracting parties, and possibly between an investor and a host state. Finally, the new instrument should achieve a satisfactory balance of commitments among countries with centralised and federal systems of government and adequately address issues concerning regional economic integration organisations.

It is reasonable to expect that the highest standards of liberalisation and investment protection could be achieved between OECD countries which are already well advanced on the path of liberalisation and remain the main sources and recipients of foreign direct investment. As a number of developing countries are becoming significant players and are applying more liberal policies, it is also envisaged that the agreement would be open to participation by non-member countries.

Both business and labour have expressed support for a multilateral investment agreement. The OECD consultative process with the social partners ensures that the views of the international business and labour communities will be taken into consideration when elaborating the agreement.
NOTES AND REFERENCES


2. These are all the original Member countries of the OECD with the exception of Canada which adhered to the Capital Movements Code in 1985. Japan, Finland, Australia New-Zealand and Mexico adhered to the Code upon becoming Members of the Organisation in 1964, 1969, 1971, 1973 and 1994 respectively. Since the reunification of Germany on 3rd October 1990, the Code applies to all the Länder.

3. The full text of this amendment to the Code reads as follows:

"The authorities of Members shall not maintain or introduce regulations or practices applying to the granting of licences, concessions, or similar authorisations, including conditions or requirements attaching to such authorisations and affecting the operations of enterprises, that raise special barriers or limitations with respect to non-resident (as compared to resident) investors, and that have the intent or the effect of preventing or significantly impeding inward direct investment by non-residents."

4. All Member countries but Turkey originally adhered to the 1976 Declaration on International Investment and Multinational Enterprises and accepted the related Council Decisions. Turkey accepted these commitments in 1981, and Mexico in 1994. The European Economic Community has associated itself to the section on National Treatment of the Declaration. Hungary, the first non-Member to do so, adhered to the Declaration and related Decisions in April 1994.

5. The understanding reached in November 1988 by the Committee on International Investment and Multinational Enterprises on a standstill with respect to measures constituting an exception to National Treatment was as follows:

"In the context of its continued discussion of extending the application of National Treatment, the Committee noted that Ministers had also called for the avoidance of backsliding by Member countries (Ministerial Communiqué of 19 May 1988). In order to comply with the intention expressed by Ministers in this regard, the Committee stressed that it is particularly important, in the period leading up to the completion of the 1990 Review of the OECD 1976 Declaration and Decisions on International Investment and Multinational Enterprises and to the adoption of a possible new and strengthened National Treatment instrument, that Member countries avoid the introduction of new measures or practices which constitute exceptions to the present National
Treatment instrument. The Committee further agreed that it would pay particular attention to this question in its regular follow-up of changes in practices and policies in Member countries."

In December 1991, the OECD Council reiterated its support on this understanding in adopting the reinforced procedures concerning the Instrument relating to the National Treatment.

6. See the "OECD Code of Liberalisation of Capital Movements" (1993), and "National Treatment for Foreign-Controlled Enterprises [GD(94)54]. For a full review of the National Treatment instrument see "National Treatment for Foreign-Controlled Enterprises" (1993).

7. The OECD revised in February 1992 its 1983 Benchmark Definition of Foreign Direct Investment to more accurately reflect direct investment transactions and to take into account the experience gained in applying the Benchmark. While improvements have been achieved in the comparability of data, divergences still exist between the methodology used by some OECD members and the Benchmark methodology. The OECD Council recommended that Members take steps to bring their methodology into line with the revised benchmark definition as soon as possible.

8. In addition to International Direct Investment, Policies and Trends in the 1980s (1992), see the studies published in the series "International Trade in Services" concerning Insurance (1983), Banking (1984), Audio-visual Works(1986) and Securities (1987). There has also been a publication on "Liberalisation of Capital Movements and Financial Services in the OECD Area" (1990) as well as the Tourism Committee’s study on "Inventory of Measures perceived as Obstacles to International Tourism in the OECD Area" (1991).

The CIME has a broad mandate. It may undertake analytical studies on a variety of subjects such as foreign direct investment trends and policies, the relationship with other major policy areas (trade, industry, competition, taxation ...), and the structure and the operation of multinational enterprises and their evolution. Clearly, this analytical work can be a source of inspiration for a future enlargement and strengthening of the OECD instruments pertaining to international direct investment.

9. Before their consideration by the Council, all reports and proposals by the CMIT Committee made in accordance with the provisions of either of the Codes of Liberalisation are reviewed by the Payments Committee, where Delegates speak on behalf of the Member countries they represent. The Payments Committee may forward to the Council any comments on the CMIT Committee reports and proposals that it considers necessary.