



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Expert Group No.1 on Selected Issues Concerning Dispute Settlement and Geographical Scope

GEOGRAPHICAL SCOPE OF COVERAGE OF THE MAI

(Note by the Chairman)

GEOGRAPHICAL SCOPE OF COVERAGE OF THE MAI

Exclusive Economic Zone and Continental Shelf

1. At its December meeting, the Negotiating Group considered the question of whether the MAI obligations should apply to investment in the Exclusive Economic Zone (EEZ) and continental shelf of parties. The Chairman concluded [DAFFE/MAI/M(95)3, section 3] that there was a general consensus that the MAI should have as wide as possible a geographical application, including investments in the EEZ and the continental shelf. The legal question of how to do this without conflicting with international law conventions should be studied further, but the Chairman thought that a clause of general application would be preferable to a case-by-case approach.

2. The Expert Group addressed this issue at its meeting on 29-31 January and agreed to consider drafting proposals for text which would reflect that investment in economic activities in the EEZ and on the continental shelf under the jurisdiction of a MAI Party, should be included in the scope of the MAI [DAFFE/MAI/EG1/M(96)1]. The Group noted the legal background and precedents which were set out in the the Chairman's note [DAFFE/MAI/EG1(96)2].

Draft Article

"Geographical Scope of Application

The MAI shall apply to investments in areas under the jurisdiction of a Contracting Party, (hereinafter, 'in its jurisdiction'). These areas are:

- (a) the territory of a Contracting Party, including its territorial sea; and
- (b) any maritime area beyond the territorial sea, over which the Contracting Party exercises, in accordance with international law, sovereign rights and jurisdiction over the sea-bed, subsoil and the natural resources."

COMMENTARY

1. The proposed article, similar to those found in a number of bilateral investment agreements and the Energy Charter Treaty, is intended to include within the scope of the MAI, investments made within the economic jurisdiction of a party. For a coastal state, that includes not only its territory and territorial sea, over which it enjoys full sovereignty, but also the maritime areas beyond the territorial sea in which it has or exercises sovereign rights and jurisdiction over economic activities in accordance with international law, as reflected in the 1982 UN Convention on the Law of the Sea (LOS). The express inclusion of these areas in the geographical scope of the MAI would assure the protection of all investment within this important area of economic activity.
2. Consistently with international law, the obligations of a party in these areas under the MAI would extend only to activities subject to its sovereign rights and jurisdiction and their inclusion would impose no obligations regarding activities carried out pursuant to the rights of other states in those areas, e.g. laying or operation of submarine pipelines and cables.
3. The proposed text does not define "territory" to include the EEZ or the continental shelf but, recognising, the legal differences between the overall rights of coastal states in their territory and the more complex situation in the EEZ and continental shelf, uses the more neutral phrase "areas under its jurisdiction".
4. One delegation indicated that it had difficulty with proceeding by general inclusion of these areas within the geographic scope of the MAI, and suggested instead a selective approach, referring to investments with a land based link, to artificial islands, installations and structures within the coastal state's exclusive rights, and those cables and pipelines the MAI party authorises (Contribution by the delegation DAF/MAI/RD(95)10]. It also suggested that any solution avoid the need for the type of declarations which accompanied the ECT Article 7.¹
5. The Expert Group considered the above suggestion and there was a broadly shared view that:
 - (a) the provisions of the 1982 LOS Convention regarding fisheries and harvesting or processing of natural resources are not a legal bar to the general application to the EEZ of the MAI, including its non-discrimination provisions;
 - (b) inclusion of these areas would not imply undue coastal state obligations regarding activities such as the laying of pipelines and cables, or the construction of installations and structures for non economic purposes by or under the authority of other states;

¹ Given the fact that ECT included an Article 7 on transit rights, which directly raised considerations regarding submarine cables and pipelines, a number of signatories made a joint declaration that this article was subject to the conventional rules of international law on the subject, and, absent such rules, to general international law. They also declared that Article 7 was not intended to affect, and could not be considered as affecting, the existing international law on the subject. See, Declaration with respect to Article 7, Final Act of the Energy Charter Conference, AF/EECH/17.

- (c) investments in the continental shelf should be generally included, and the coverage should not depend upon an investment having a landbased link in the territory of the coastal state to bring an investment within the coverage of the MAI; and
- (d) an approach of specifying artificial islands, structures and installations would not encompass all relevant economic activity in which investments could be made respecting the EEZ and continental shelf.