



Negotiating Group on the Multilateral Agreement on Investment (MAI)

THE RELATIONSHIP BETWEEN THE MAI AND THE WTO AGREEMENTS

(Note by the Chairman)

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1. The Multilateral Agreement on Investment is likely to affect some of the same areas of business activity as the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Investment Measures (TRIMS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Consequently, the MAI negotiators may want to identify instances where the provisions of the MAI and the provisions of the WTO agreements may overlap and ensure that the provisions fit together. In addition, negotiators may want to examine the consequences where MAI obligations go further than WTO obligations. This note considers the relationship between the MAI and the WTO agreements in four areas: agreement coverage, substantive obligations, dispute settlement and remedies. The main part of the note discusses, and poses questions about, key issues; the annex addresses certain of the issues in greater detail.

I. Overlap with the WTO Agreements on Trade in Goods, Trade in Services, Trade-Related Investment Measures and Trade-Related Aspects of Intellectual Property Rights

2. The MAI will apply to investors and investments that are engaged in a broad range of activities, including trade in goods and trade in services. Consequently, there will be instances in which both the MAI and one or more WTO agreements may have application. For example, consider an enterprise that, having imported goods for resale, is subjected to requirements with respect to its goods that favour the sale of domestic goods. Both the MAI and the GATT might apply: the MAI because it would require a member to treat the enterprise, in its day to day operations, as favourably as a domestic enterprise, and the GATT because it would require a Contracting Party to treat the enterprise's goods as favourably as domestic goods.

3. The Chairman's Note entitled "The MAI and Bilateral, Sectoral and Regional Agreements" [DAFFE/MAI/(96)26] discusses the question of whether the MAI should contain a rule of interpretation that addresses cases of overlap. Here, it may be noted that where MAI and WTO provisions address similar subject matter, the provisions are likely to complement each another. In the above example, the MAI and the GATT provisions under consideration both address the subject of national treatment. The provisions do not conflict; rather, one provision addresses treatment of the enterprise and the other addresses treatment of the enterprise's goods.

4. Differences in wording and intent between MAI and WTO provisions may result in differences in obligation, with the result that one agreement may require a higher level of treatment than the other. Here again, the problem is not one of conflict; rather, the higher of the two standards would be available by invoking the relevant agreement.

5. There will also be cases in which the MAI and a WTO agreement address different subject matter. For example, the MAI will address comprehensively the subject of expropriation. This subject is not addressed in any of the WTO agreements. However, just as the MAI and the WTO agreements would appear to complement each other in cases where they address the same issue, it would appear that they will also complement each other where they address different issues.

Questions:

Do negotiators agree that the substantive provisions of the MAI and the WTO agreements are complementary in purpose and content?

Have negotiators identified any instances in which the obligations of the MAI and the WTO agreements are likely to conflict?

II. Most Favoured Nation Treatment Under the General Agreement on Trade in Services

6. MAI negotiators have expressed concern that Article II of the GATS could give rise to a free rider problem. That Article provides that a GATS member must “accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like service suppliers of any other country”. The article may require MAI signatories to extend MAI treatment to some enterprises in non-MAI countries; specifically, to enterprises that are both investors within the meaning of the MAI and service suppliers within the meaning of the GATS.

7. In many cases, MAI members are unlikely to be concerned that a MAI obligation might benefit all GATS members. This would be the case where a MAI member already applies the MAI standard to enterprises from non-MAI states or where the MAI obligation, although higher than a MAI member’s existing standard of treatment, can be met only in a way that benefits all states. For example, some countries that accede to the MAI might find that the transparency obligation of the Agreement exceeds their current standards of transparency. However, by its very nature, a high level of transparency cannot be restricted to MAI members. It would accrue to the benefit of all states.

8. There are other cases where negotiators will need to consider whether it is problematic that a MAI obligation might have to be extended to all GATS members. For example, a MAI member may be prepared to subject to MAI disciplines a service sector that it has not listed in its GATS schedule. Or the member may be prepared to offer, in a given service sector, a more comprehensive level of national treatment in the MAI negotiations than it offered in the GATS negotiations. In these cases, the member must consider whether there is an economic or political cost to extending the MAI level of treatment to other states and, if so, whether that cost is sufficiently high that the member should refrain from offering a level of treatment in the MAI that is greater than the level of treatment that it offered in the GATS.

9. It is also necessary to consider whether Article II of the GATS would apply to procedural obligations as well as substantive obligations. In particular, would Article II oblige MAI members to extend the provisions of the MAI on investor to state dispute settlement to investors from non-MAI states? On this question, it should be noted that prospective members of the MAI are already parties to bilateral investment treaties that provide for investor to state arbitration. If Article II applies to dispute settlement regimes, those states that failed to exempt dispute settlement from Article II during the GATS negotiations would appear to be under an existing obligation to extend investor to state arbitration to the investors of all GATS members. The question of whether Article II applies to procedural regimes is considered in the annex to this note.

Question:

Could negotiators comment on whether Article II of the GATS would require MAI members to extend some MAI procedures to individuals and enterprises that are both investors within the meaning of the MAI and service suppliers within the meaning of the GATS?

10. Article V of the GATS is a potential solution to the free rider concern. That Article, entitled “Economic Integration”, provides that GATS members may enter into an agreement that liberalises trade in services provided that certain requirements are met, including the procedural requirement that the Council for Trade in Services be notified of the agreement. Notification may lead to study by a working party. Such agreements may be exempted from the application of MFN treatment. From a legal perspective, the question of whether the MAI would meet the requirements depends in large measure on whether the MAI has substantial sectoral coverage. That question is considered in the annex to this note. If the MAI negotiators are of the view that Article V might apply to the MAI, there is a further important consideration; namely, whether reliance on Article V is considered to be compatible with the commitment of the MAI parties to broad multilateralism.

Question:

Could negotiators comment, from both policy and legal perspectives, on the possible application of Article V of the GATS to the MAI?

III. Overlap with the WTO Understanding on Dispute Settlement

11. On occasion, a MAI member will find it necessary to consider whether it should commence dispute settlement proceedings and, if so, whether the proceedings should be commenced under the MAI or a WTO agreement. Put this way, the question assumes that the member will choose between the MAI and the WTO. In some cases, the member might desire to commence proceedings in both fora. The member might have quite understandable reasons. The member may hold the view that it has distinct rights and remedies under the MAI and one or more WTO agreements. Or the member may be unsure which agreement applies or want to pursue remedies under as many agreements as possible.

12. The MAI negotiators could take the view that a MAI member can commence proceedings under both the MAI and one or more WTO agreements. This approach relies on the good sense of member countries to refrain from commencing two sets of proceedings when one will do. However, a member may be inclined to err on the side of two proceedings because it would prefer to avoid a hard choice or because it faces pressure from interests that may consider multiple proceedings more conducive to settlement. At the same time, a member faced with the prospect of defending two proceedings may experience domestic pressure to respond firmly. Dual proceedings also expose MAI members to the risk that different panels may come to different conclusions about whether an obligation, such as national treatment, has been violated. Or the panels, being in agreement that a member has failed to accord national treatment, may make recommendations or orders that mesh poorly.

13. To address these problems, the MAI negotiators could take the view that a member that commences proceedings under the MAI cannot also commence proceedings in the WTO and vice versa. This approach requires consideration of a subsidiary question: in what circumstances must a member make an election about what agreement it will rely on? The North American Free Trade Agreement presents one possible response to this question. Under Article 2005 of that agreement, a NAFTA party must elect whether to proceed under the NAFTA or in the WTO in any case where the dispute is in regard to “any matter arising under both [the NAFTA and a WTO agreement]”. Failure to comply with this obligation would itself constitute a violation of the NAFTA. The NAFTA leaves it to the parties and, if necessary, to a dispute settlement panel, to determine what constitutes a matter arising under both the NAFTA and a WTO agreement.

14. The MAI negotiators might also want to consider whether there are circumstances in which a MAI member should be required or encouraged to proceed under the MAI rather than under a WTO agreement or vice versa. Consider a case in which two members desire to commence proceedings under the MAI and a third member favours proceedings under the GATS. Should the MAI provide that the third member must also submit its claim under the MAI? The NAFTA addresses this question in the context of a three party agreement under which two parties may desire to commence dispute settlement proceedings against the third party. In that context, paragraph 2 of Article 2005 provides that the two parties shall consult with a view to agreement on a single forum and that, failing agreement, the proceedings shall normally be initiated under the NAFTA.

15. One can also envisage scenarios in which a member state proposes to commence proceedings in the WTO and its investor proposes to commence proceedings under the MAI. Negotiators might want to consider whether the MAI should contain a provision that bars or stays a proceeding by the state in such circumstances. Such a provision would promote the objective of depoliticizing disputes and would avoid the risk of inconsistent decisions, one on a state to state level and one on an investor to state level. However, application of the provision might be cumbersome in a case where several investors have a grievance but are divided on the question of whether state to state or investor to state proceedings are appropriate. Alternatively, the MAI could bar or stay proceedings by investors in a case where the state proposes to commence proceedings in the WTO. However, the investor could be significantly disadvantaged to the extent that the remedies in the WTO did not include compensation.

Questions:

Should the MAI require a member to elect between proceedings under the MAI and proceedings in the WTO and, if so, in what circumstances?

Should the MAI require or encourage a member to proceed under the MAI where one or more other MAI members favour proceedings under that agreement (and conversely, in the WTO where one or more other MAI members favour that forum) and, if so, in what circumstances?

When an investor proposes to commence proceedings under the MAI, should the MAI bar or stay proceedings by the state in the WTO; when a state proposes to commence proceedings in the WTO, should the MAI bar or stay proceedings by an investor under the MAI ?

IV. Sanctions for Non-compliance

16. Expert Group No. 1 is considering what sanctions should apply in the case of non-compliance with an arbitral award. At its most recent meeting, the Group focused on suspension from the proposed Parties Group and suspension of access to the dispute settlement regime. These remedies would appear to be consistent with WTO obligations. The Expert Group also gave some consideration to suspension of MAI benefits as a countermeasure. If delegations conclude that the MAI should in principle provide for this measure, there will need to be further consideration of the relationship between MAI remedies and WTO obligations.

THE RELATIONSHIP BETWEEN THE MAI AND THE WTO AGREEMENTS ANNEX

1. The purpose of this annex is to assist delegations in their consideration of the issues discussed in the Chairman's Note.

I. The MAI and Trade in Goods

2. One can envisage scenarios in which a MAI member might have rights under both the MAI and the General Agreement on Tariffs and Trade. For example, one of its investors might operate an enterprise in another MAI country that is faced with taxes or other charges, on goods that it imports or produces, that are designed to protect domestic production. Or the enterprise might import goods from its home country and be faced with measures that treat the goods, in respect of their resale, less favourably than domestic goods. In such cases, both the MAI and the GATT might apply.

3. The MAI might apply because it will contain obligations to provide national treatment and a minimum standard of treatment. Negotiators are continuing to consider the precise formulation and application of these obligations. For present purposes, it is sufficient to note that these obligations would apply to the day-to-day operation of an enterprise. Consider the case of an enterprise that imports goods for resale. The MAI obligations would entitle the enterprise to be treated as favourably as domestic enterprises and would protect the enterprise from discriminatory and/or unreasonable treatment.

4. At the same time, the GATT might apply because it obliges the Contracting Parties, in some cases, to provide national treatment to the goods of other Contracting Parties. Thus, paragraph 4 of Article III of the GATT provides that a Contracting Party shall accord to imported products treatment no less favourable than that accorded to domestic products in respect of measures affecting their internal sale, offering for sale, purchase, transportation, distribution or use. In addition, paragraph 2 of Article III provides that a Contracting Party shall not apply internal taxes or charges to imported or domestic products in a manner contrary to the principle set out in paragraph 1 of the Article. Paragraph 1 provides that a Contracting Party should not apply internal taxes or charges affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products to imported or domestic products so as to afford protection to domestic production. Again, consider the case of an enterprise that imports goods for resale. The GATT obligations would entitle the enterprise's goods to be treated as favourably as domestic goods and would shield those goods from charges designed to protect domestic production.

5. Does it matter that both the MAI and the GATT might apply to a given fact situation? Considering matters from the perspective of the state, there is a need to ensure, during the negotiations, that MAI and GATT obligations do not impose conflicting requirements on governments. That said, there would appear to be little scope for conflict. The obligations of the two agreements are likely to complement each other, with those of the MAI applying to investors or their investments and those of the GATT applying to the goods of certain kinds of investments.

II. The MAI and Trade in Services

6. In some cases, a MAI member may have rights under both the MAI and the General Agreement on Trade in Services. For example, one of its enterprises might have a subsidiary in another MAI country that supplies construction services that is subjected to a measure that discriminates against its services in favour of domestic services. The enterprise's home state may take the view that the enterprise is both an investor within the meaning of the MAI and a service supplier within the meaning of the GATS, and therefore entitled to protection, under both agreements, from measures that treat its subsidiary less favourably than domestic enterprises.

7. The possibility of parallel rights will arise in any case in which a MAI member's enterprise fits both the definition of investor and service supplier. Under the MAI, an investor is a natural or legal person that makes an investment. Under the GATS, a service supplier is a natural or legal person that supplies a service. A service supplier enjoys the protection of the agreement when it supplies a service in one or more of four modes:

- in mode 1, the service supplier delivers a service across a border without moving across the border (for example, the service may be supplied by mail or by telecommunications);
- in mode 2, the service supplier delivers a service in its own territory to a consumer, or property of a consumer, that comes to the supplier;
- in mode 3, the service supplier establishes a "commercial presence" in another territory through which it supplies the service; and
- in mode 4, the service supplier sends natural persons across the border to provide the service.

8. In assessing the degree of overlap between the MAI and the GATS, it may be useful to consider the extent to which the MAI and the GATS cover the same kinds of natural and legal persons. In the MAI negotiations, the definition of "investor" remains under consideration. Under the GATS, a service supplier that is a natural person must be a national or, in cases where a GATS member does not have nationals, a permanent resident. A service supplier that is a juridical person must be both organised under the laws of a GATS member and be engaged in substantive business activities in its home territory or in the territory of a GATS member.

9. In addition, it may be useful to consider the degree to which the MAI and the GATS cover the same kinds of business activities. To what degree does the concept of an investor making an investment include the concept of a service supplier supplying a service in one of the four modes?

10. Clearly, both the MAI and the GATS may apply to a MAI enterprise that establishes a "commercial presence" in the territory of another MAI member from which it supplies a service (mode 3). Under the GATS, an enterprise establishes a commercial presence by creating, acquiring or maintaining a business or professional establishment for the purpose of supplying a service. This definition would include, for example, an enterprise from a MAI territory that establishes a subsidiary in another MAI territory for the purpose of providing construction services.

11. In addition, it is possible that both the MAI and the GATS could apply to a MAI enterprise that sends natural persons to the territory of another MAI member to supply a service (mode 4). For example, an enterprise from one MAI territory may enter into a contract to manage a hotel in another MAI territory.

12. Matters are less clear with respect to modes 1 and 2. In the case of mode 1, the question is whether there are circumstances in which the MAI would apply to an enterprise that provides a service, from its own territory and by such means as mail or telecommunications, to a government or enterprise of another MAI territory. In the case of mode 2, the question is whether there are circumstances in which the MAI would apply to an enterprise that provides a service, wholly within its own territory, to a government or enterprise of another MAI territory.

13. It may also be useful to consider the extent to which the MAI and the GATS are likely to cover the same service sectors both at the time that the MAI comes into force and in the future. In general, the MAI will apply to all MAI investors and investments engaged in the supply of services except in a limited number of sectors for which MAI members make reservations. The GATS, except in the area of most favoured nation treatment and transparency, applies only to service sectors that GATS members have specifically offered for inclusion. It is safe to assume that the MAI will apply to a good many more service sectors than the GATS does at the present time.

14. Similarly, it may be useful to consider the extent to which the MAI and the GATS, where they both apply to a service sector, are congruent in their obligations. MAI obligations are likely to differ from GATS obligations in two respects: first, MAI obligations are likely to be stronger than GATS obligations in cases where both agreements address an issue (for example, the MAI is likely to require a higher level of transparency than the GATS), and secondly, the MAI will almost certainly contain obligations that do not have a counterpart in the GATS (for example, the GATS does not contain provisions on compensation in the event of expropriation). In addition, MAI exceptions may in some cases be narrower than GATS exceptions.

15. The GATS operates differently than the MAI is likely to operate with respect to market access and national treatment. The former agreement does not contain market access and national treatment obligations that apply, except where a reservation or exception applies, to all service sectors and ways of doing business. Rather, these obligations apply only to service sectors that a GATS member has chosen to list and, where a sector is listed, only to listed modes of supply. For example, a GATS member may offer market access to enterprises that supply computer services but only in cases where the service supplier establishes a commercial presence. Where a mode of supply is listed, there may be further limitations on doing business within the mode of supply. For example, the supplier of computer services may be entitled to establish a commercial presence but may not have the same rights as a domestic computer supplier to apply for subsidies for research and development.

16. From the foregoing, it is clear that MAI members will have rights under both the MAI and the GATS with respect to their investor/service suppliers. However, the rights of members under the MAI are likely to be greater than their rights under the GATS.

III. The GATS and its Implications for the MAI

17. Article II of the GATS presents a potentially more problematic issue. Under that article, a GATS member must “accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like service suppliers of any other country”. The article may require MAI signatories to extend MAI treatment to some enterprises in non-

MAI countries; specifically, to enterprises that are both investors within the meaning of the MAI and service suppliers within the meaning of the GATS.

18. In some cases, MAI members are unlikely to be concerned that a MAI obligation might benefit all GATS members. This would be the case where a MAI member already applies the probable MAI standard to enterprises from other states or where the MAI obligation, although higher than a MAI member's existing standard of treatment, can be met only in a way that benefits all states. Consider the MAI obligation to provide transparency with respect to measures that may affect investors or investments. Some countries that accede to the MAI might find that this obligation exceeds their current standards of transparency. However, by its very nature, a high level of transparency cannot be restricted to MAI members. It would accrue to the benefit of all states.

19. There are other cases where delegations will need to consider whether it is problematic that a MAI obligation might have to be extended to all GATS members. For example, a MAI member may be prepared to subject to MAI disciplines a service sector that it has not listed in its GATS schedule. Or the member may be prepared to offer, in a given service sector, a greater level of national treatment in the MAI negotiations than it offered in the GATS negotiations. In these cases, the member must consider whether there is an economic or political cost to extending the MAI level of treatment to other states and, if so, whether that cost is sufficiently high that the member should refrain from offering a level of treatment in the MAI that is greater than the level of treatment that it offered in the GATS.

20. It is also necessary to consider whether Article II of the GATS would apply to procedural obligations as well as substantive obligations. Specifically, would Article II oblige MAI members to extend to other states the provisions of the MAI on investor to state dispute settlement? Article II requires most favoured nation treatment "with respect to any measure covered by this Agreement". Article I provides that the GATS applies to "measures by Members affecting trade in services". Article XXVIII of the GATS states that:

"measures by Members affecting trade in services" include measures in respect of

- (i) the purchase, payment or use of a service;
- (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;
- (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another member."

21. Article II requires a GATS member to accord most favoured nation treatment with respect to beneficial measures that come within the foregoing definition. The definition would appear to be focused on substantive measures that affect trade in services.

22. Finally, delegations might want to consider whether the MAI might be exempt from Article II of the GATS by virtue of Article V of that agreement. This is an important policy issue as well as a legal issue. Article V of the GATS, entitled "Economic Integration", provides that GATS members may enter into an agreement that liberalises trade in services provided, among other things, that the agreement "has substantial sectoral coverage". A footnote to Article V amplifies on the condition as follows: "This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply". The condition might be met if the MAI did not "provide for the *a priori* exclusion of any mode

of supply”. In this respect, delegations might want to consider whether the MAI would apply, in some circumstances, to modes 1 and 2 as well as modes 3 and 4 and, if not, whether the failure to cover modes 1 and 2 would constitute providing for their *a priori* exclusion. If delegations conclude that the MAI would provide for their *a priori* exclusion, they may want to consider whether the requirements of Article V would nevertheless be satisfied. Note that that sentence says that an agreement to liberalise trade in services “should not provide for the *a priori* exclusion of any mode of supply”. Does “should” mean should or does it mean shall? In other provisions of the GATS, the negotiators have used the word “shall” rather than “should” when they intend a requirement to be mandatory. If delegations conclude that Article V might apply to the MAI, there is a further policy issue for consideration; namely, whether reliance on this Article is compatible with the commitment of MAI members to broad multilateralism.

IV. The MAI and Trade-Related Investment Measures

23. The MAI, like the Agreement on Trade-Related Investment Measures, will address certain investment measures that have a restrictive or distortive effect on trade. The MAI will be broader in coverage (the TRIMS agreement applies only to trade in goods) and is likely to contain stronger obligations. Consequently, while there may be overlap between the MAI and the TRIMS agreements, the two agreements are unlikely to conflict.

V. The MAI and Trade Related Aspects of Intellectual Property Rights

24. Negotiators have yet to decide on the degree to which the MAI should cover intellectual property interests. Absent special provisions, an investor whose investment consisted, in whole or in part, of a right in intellectual property would be entitled to the benefit of such MAI obligations as national treatment, most favoured nation treatment, a minimum standard of treatment, a right of transfer, compensation in the event of expropriation and investor to state dispute settlement. Under TRIPS, the investor’s home state would also enjoy the benefit of such obligations as national treatment and most favoured nation treatment, but focused specifically on the protection of intellectual property. In the course of the MAI negotiations, it may be useful to consider possible differences between the MAI and TRIPS in the following areas: the definition of intellectual property, the content and operation of obligations common to both agreements (for example, national treatment), the operation of obligations that are not common to both agreements (for example, MAI obligations with respect to expropriation and investor to state dispute settlement) and exceptions and reservations.

VI. The MAI and Dispute Settlement under the WTO and other Agreements

25. On occasion, a MAI member will find it necessary to consider whether it should commence dispute settlement proceedings and, if so, whether the proceedings should be commenced under the MAI or a WTO agreement. Consider the example of a member that is the home state of an enterprise that has a subsidiary in another MAI member. The subsidiary, which imports goods from the home state for resale, is subjected to a measure that discriminates against its goods in favour of domestic goods. In this example, the enterprise’s home state has a number of questions to consider:

- should the member commence state to state proceedings or should it advise its investor to commence domestic or investor to state or domestic proceedings (for example, is there an important question of principle involved that cannot be adequately addressed in domestic or investor to state proceedings or are there differences in the remedies available that may become relevant);

- if the member decides that it should commence state to state proceedings, is the MAI or the WTO the appropriate forum having regard to the nature of the issues and the number and identity of the countries that may have an interest, and possibly a role to play, in the outcome (for example, is the issue primarily of concern to two or more MAI members or is it of concern to the broader WTO membership);
- are there differences in the substantive obligations of the MAI and the GATT (the applicable WTO agreement in the example) that would make proceedings under one agreement more appropriate to the facts (for example, are there relevant differences in the formulation of the national treatment obligations of the two agreements and are there relevant rules of international law that may not be applicable under the GATT);
- are there differences in the dispute settlement procedures of the MAI and the GATT that would make proceedings under one agreement more appropriate than the other (for example, are there relevant differences in the rules relating to the time-frame for completing proceedings, the consultation process, the role of third party states in the proceedings, the selection and makeup of panels, the procedure for dealing with multiple complaints, interim relief, onus of proof, evidence, publication of awards and appellate review); and
- are there differences between the MAI and the GATT with respect to the remedies that are available (withdrawal of the discriminatory measure, compensation, suspension of benefits), the criteria that must be met to obtain a remedy (for example, a requirement relating to the nature and extent of the injury that must be suffered or a requirement that one remedy fail before another remedy becomes available) or the procedure for the enforcement of a remedy (peer pressure, direct enforcement in domestic courts) that would make proceedings under one agreement more appropriate than the other.

26. Whilst this paper focuses on the relationship between the MAI and the WTO agreements, note that the member might find it necessary to extend this analysis beyond the MAI and the WTO agreements. For example, the member might also have the right, on the facts, to commence dispute settlement proceedings under a free trade agreement or under a bilateral investment treaty. In the end, the member must answer two questions: is the dispute one that needs to be resolved at the state level and, if so, is the MAI the best place to resolve the dispute having regard to the obligations, procedures and remedies available in other potential fora.

27. There may be instances where a MAI member desires to proceed in more than one forum. The main part of this note addresses the question of whether the MAI should contain a rule that requires a member to elect between possible fora. Here, it might be noted that the question of elections also arises with respect to investors who may have a right to commence investor to state proceedings under more than one agreement.