



Negotiating Group on the Multilateral Agreement on Investment (MAI)

THE MAI AND THE OECD INSTRUMENTS

(Note by the Chairman)

THE MAI AND THE OECD INSTRUMENTS

(Note by the Chairman)

1. This paper addresses the relationship between the MAI and the OECD Codes of Liberalisation and Declaration on International Investment and Multinational Enterprise, in particular the Guidelines on Multinational Enterprises.

2. A consideration common to the questions of the relationship of the MAI to other agreements and instruments is that successive international agreements may legally and practically coexist with overlapping coverage and varying substantive, procedural and dispute settlement provisions. Where they are incompatible and cannot co-exist, international law provides solutions and in most cases the later in time prevails.¹ However, not all differences are incompatibilities -- incompatibility is essentially a matter of intent. It is not likely that incompatibilities in the legal sense will arise between successive instruments with common objectives, such as investment liberalisation and protection which are intended to grant rights to private parties, not curtail them.

I. The General Relationship

3. The OECD has a number of interlinked instruments which, though not limited to investment, provide a fairly broad approach to international investment matters. These are: the Codes of Liberalisation of Capital Movements and of Current Invisible Operations and the instruments associated with the 1976 OECD Declaration on International Investment and Multinational Enterprises, i.e., the Guidelines for Multinational Enterprises, National Treatment, Conflicting Requirements and International Investment Incentives and Disincentives. The Codes deal with investment by non-resident enterprises including the right of establishment. After entry, the treatment accorded to foreign controlled enterprises operating in Member countries, including new investment by already established foreign-controlled enterprises, is covered by the National Treatment Instrument.

4. A range of interests covered by the existing OECD instruments will also be protected under the MAI. The MAI will provide for non-discrimination in both the establishment and post-establishment phase; national treatment is at the heart of the MAI where it will be a legal obligation, while it remains substantively non-binding under the OECD National Treatment Instrument; liberalisation, rollback and other relevant concepts of the OECD instruments will have their counterpart under the MAI. Other aspects of the instruments are already on the agenda, i.e., conflicting requirements (Expert Group N°1) and investment incentives and disincentives (Expert Group N°3). The Guidelines for Multinational Enterprises are discussed below (in paragraph 8 ff.)

5. In the area of overlap, which is still not wholly defined, the terms of the MAI will not, in all cases, be identical to those of the OECD Codes and Declaration. However, for the reasons stated in

¹ The general legal rule for such situations, set out in Article 30 of the Vienna Convention on the Law of Treaties, is that, absent specific provision, as between parties to successive treaties which both remain in force, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."

paragraph 2, above, the undertakings of OECD Member countries pursuant to the OECD instruments would not put them in conflict with their MAI undertakings, and vice versa. Moreover, if conflict were to occur, the MAI would prevail under the normal treaty rules.

6. The contents of a state of the art and free standing MAI should be determined by its own goals and negotiating dynamics. If, as a result of overlap, OECD Members consider the Codes and Declaration to have become to some degree redundant, it would be for the CIME, CMIT and the OECD Council, not the MAI Negotiating Group, to consider the implications and make the appropriate adjustment in those instruments and in the related institutional arrangements and work programme.

7. It may, nevertheless, be useful to note that the MAI will not completely cover the matters dealt with in the OECD instruments. For example, the Codes cover liberalisation of all capital flows, and most current invisible transactions, much of which will not be covered by the MAI. The Codes may thus be expected to retain their value as a basis for promoting liberalisation by OECD Members and as a yardstick for gauging the readiness of non-member countries to join the Organisation.

Question:

As the MAI would prevail in the event of any (unlikely) conflict, do Delegations agree that the MAI does not require provisions addressing its relationship with the OECD Codes or the OECD Declaration and Decisions on International Investment and Multinational Enterprises?

II. The Guidelines on Multinational Enterprises

8. The question to be addressed at present is whether and how to treat the Guidelines for Multinational Enterprises.

9. The Guidelines are recommendations jointly addressed by the OECD governments to multinational enterprises operating in their territories. They represent the collective expectations of these governments concerning the behaviour and activities of multinational enterprises. Observance of the Guidelines is voluntary and not legally enforceable. Their objective is to provide guidance by setting standards addressed to these enterprises. In particular, as part of a balanced framework for promoting international co-operation in the field of foreign direct investment, they are intended to help ensure that their operations are in harmony with the national policies of the countries where they operate and to strengthen the basis of mutual confidence between enterprises and governments.

10. Annex I of the Declaration states that the issues addressed by the guidelines are relevant beyond the OECD area and that co-operation in the field should extend to non-member countries. It also states that the Guidelines and other matters such as national treatment and investment incentives and disincentives are interconnected. The 1991 Review of the 1976 Declaration noted that the OECD work on the Guidelines has been guided by the desire to maintain their stability, the balance with respect to the other components of the 1976 Declaration and sufficient flexibility in the instrument to allow it to meet new developments and concerns. These considerations would favour the Guidelines being reflected in some way in the MAI.

11. The Guidelines are not legally binding and address multinational enterprises rather than governments. They could be incorporated into the MAI without modifying these characteristics. Not everything included within a treaty constitutes a legal commitment, legal effect depending upon the wording and intent of each provision. A treaty provision worded in hortatory terms will remain hortatory.

Accordingly, the Guidelines, which are not drafted as governmental obligations, can be incorporated into the MAI without turning them into governmental obligations.

12. Incorporation of the Guidelines into the MAI without changing their essential nature as recommendations to multinational enterprises could be done in a variety of ways, for example, by annexing the existing text, with any necessary technical changes, (e.g., changing "Member countries" to "Parties"), and putting a provision into the body of the MAI referring to the Annex as Guidelines which MAI Parties "set forth" or "agree to promote".

13. As non-OECD Member countries would adhere to the MAI, it would be necessary for them to adhere specifically to the Declaration at the same time as they adhere to the MAI itself. Separate adherence would underline the different legal status of the Guidelines and facilitate future changes in the Guidelines which would then not need to be subject to the general procedures governing the amendment of treaties. However, it could be understood that all Parties to the MAI should adhere to the Guidelines.

14. Legal obligations of a procedural nature on contact points and periodic review, could also be included in the MAI without making the substance of the Guidelines binding, as is done for the Guidelines now by the Second Revised Decision of the Council on the Guidelines [C(91)73]. However, an MAI Parties Group would then need to take over the role currently played by the CIME with respect to clarification and consultation. BIAC and TUAC would no doubt wish to obtain with respect to the Parties Group the same access they currently enjoy with the CIME.

Questions:

- a. *Do Delegations consider that the Guidelines should be brought within the framework of the MAI as non-binding recommendations to enterprises? If so, how should this be done?*
- b. *Should the Parties Group be given competence to consider Guidelines issues in a manner similar to the current CIME arrangements, including the arrangements for participation by BIAC and TUAC in certain procedural matters?*