



Negotiating Group on the Multilateral Agreement on Investment (MAI)

MAIN FEATURES OF THE MULTILATERAL AGREEMENT ON INVESTMENT

(Note by the Chairman)

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1. Since 1995, OECD Member countries and the European Commission have been engaged in negotiations to develop a multilateral agreement on investment (MAI). Their task is to elaborate the first comprehensive framework for investment with high standards of liberalisation and investment protection, with effective dispute settlement, and open to non-Members. After months of intensive discussions, the essential elements of the agreement are ready (see annex). To fulfil our mandate, we must deliver an agreement on the MAI in time for the 27-28 April 1998 Ministerial meeting. This goal is now within sight.

2. This past year, MAI negotiations have focused on refining the text and exploring solutions to the main political issues, including environment and labour matters.¹ A successful conclusion of the negotiations will depend on achieving agreement on the text and on an exceptions regime² that will, when combined with the disciplines in the text, result in both high standards of liberalisation and protection and a satisfactory balance of rights and obligations among the parties. There are other issues of political importance, such as conflicting requirements, and proposals are being discussed to address these concerns.

3. In a globalised economy, foreign investment plays a major role in economic growth and development of both home and host countries. Yet, the multilateral system lacks a comprehensive framework for investment. The MAI is intended to fill that gap by setting clear, consistent and transparent rules on liberalisation and investor protection. In particular, the MAI will:

- set a strong non-discriminatory legal regime for the treatment of investors and investments, based on a “top-down” approach and the core principles of national treatment, MFN and transparency;
- be comprehensive in its scope and coverage of investors and their investments, extending disciplines to special topics such as privatisation and monopolies and providing mechanisms for further liberalisation;
- provide the first multilateral codification of high standards of investment protection;
- reflect a balanced approach to investment by associating the OECD Guidelines for Multinational Enterprises which set voluntary standards of behaviour for international investors.

4. Dispute settlement is a fundamental element of the MAI. The combination of state-to-state and investor-to-state investor mechanisms is a major innovation in multilateral agreements. Questions have been raised about the application of the investor-to-state mechanism to obligations in the MAI which are not generally covered by bilateral investment protection treaties where investor-state dispute settlement is an accepted feature.

5. The MAI has been designed as a free-standing treaty, open to participation by non-Members willing and able to meet the obligations of the agreement. The Negotiating Group made considerable

1 See Note by the Chairman on Labour and Environment Matters, DAFFE/MAI(98)6

2 See Note by the Chairman on Exceptions, DAFFE/MAI(98)5

efforts to inform non-Members and to provide first hand opportunities for discussion³ which led to a better understanding of the MAI. The Negotiating Group was pleased to welcome last September five non-Members as observers in the Group⁴. A number of other countries have also expressed interest in early participation in the MAI.

6. As the negotiations progressed, it was evident that more efforts were needed to explain the MAI to a wider audience. Concerns were voiced that the MAI could threaten government's regulatory sovereignty including in environmental and labour matters, that it could undermine economic development policies, and that it would fail to achieve that level of liberalisation that it had set about to create. If the MAI is to become an engine for economic growth and prosperity, domestic constituencies need to be convinced that these fears are unfounded. Many national governments have responded to these concerns by actively engaging in a dialogue with different segments of society. To assist this process, the Negotiating Group has been seeking the views of non-governmental organisations and business and labour representatives.⁵

7. As an investment agreement, the MAI is primarily designed to provide security, transparency and non-discriminatory treatment for international investment. But it will not interfere with national regulations and policies which are non-discriminatory and respect basic international norms. It will provide the possibility of country specific exceptions and mechanisms for progressive liberalisation. It would serve as a reference for investment rules world-wide and provide a framework for dialogue between developed and developing countries.

8. The MAI presents a unique opportunity to meet the challenge of globalisation and to respond to the concerns of our civil societies. For all outstanding questions, options for solutions can be further refined, or new solutions explored. What is most needed is the political determination to conclude the MAI. If agreement can be reached on all substantive elements, the text and the lists of country specific exceptions, after necessary legal work, could be ready for signature in the second half of 1998.

1. *In view of the progress made since the extension of the Ministerial mandate last May, do delegations confirm their intention to conclude negotiations on the MAI in time for the next ministerial meeting in April 1998?*
2. *Do delegations support the main features of the MAI as it is emerging?*
3. *Should the dispute settlement mechanism be applicable to all MAI obligations, or are there areas where the application of investor-to-state dispute settlement should be qualified?*

3 Regular briefings were held in Paris, as well as regional activities in Latin America, Asia, the Baltic countries, and Africa.

4 Argentina, Brazil, Chile, Hong Kong and the Slovak Republic. Since January, the Baltic countries have been working in close co-operation with members of the Negotiating Group who are providing technical assistance.

5 Since December 1996, a dialogue was opened with NGOs and a major consultation was held in October 1997. Business and labour, mainly through BIAC and TUAC, have been regularly consulted, most recently in January, 1998.

ANNEX

MAIN FEATURES OF THE MAI

I. *Treatment and Protection of Investors and Investments*

1. The MAI is designed as a comprehensive agreement covering governmental measures affecting all forms of investment coming from MAI investors, including both enterprises and individuals. Its aim is to apply MAI disciplines to all sectors and at all levels of government. The definition of investment extends beyond foreign direct investment to encompass portfolio investment and other financial instruments, and intangible assets. The treatment of indirect investment, concessions, public debt, intellectual property and real estate may need further clarification.

2. National treatment and most favoured nation treatment (MFN) are central obligations of the MAI. National treatment and MFN treatment would apply to all investment phases, including the cross-border establishment of new enterprises and the activities of already established foreign-owned or controlled enterprises. This is understood to cover de jure and de facto discrimination against foreign investors and their investments although the application of the concept of de facto discrimination is still under discussion. To ensure transparency, Contracting Parties would be required to publish, or otherwise make publicly available, all laws, regulations and administrative practices that may affect the operation of the agreement.

3. One of the innovative features of the MAI is to incorporate new disciplines, (“special topics”), in areas not presently covered or satisfactorily addressed in other agreements. In particular, the MAI would:

- facilitate the temporary entry, stay and work of investors and key personnel;
- prohibit nationality requirements for executives, managers and members of boards of directors;
- prohibit certain performance requirements commonly imposed on investors and their investments such as those relating to exports, local content, and the transfer of technology;
- ensure that privatisation operations are covered by the national treatment and MFN disciplines, and by specific transparency provisions;
- ensure that designated monopolies provide non-discriminatory treatment in their operations;
- confirm the application of MAI obligations to the exercise of delegated regulatory authority by a public or private entity; and
- apply national treatment, MFN, and transparency to investment incentives. The application of additional disciplines might be the subject of future negotiations.

4. The MAI would also provide legal security and protection for investors and investments through provisions inspired by bilateral investment protection treaties (BITs). Thus, the text has been drafted to require the fair and equitable treatment of investors and their investments, and to set out rules governing expropriation and compensation, protection in case of strife, the transfer of funds, and subrogation.

5. Investment relating to financial services, including banking, securities and insurance activities, would be fully covered by the agreement, and additional disciplines have been prepared for financial services for example with respect to recognition arrangements, and membership of self-regulatory bodies. Some provisions developed for financial services, such as information transfer and data processing, may be adapted for more general application. Financial authorities may take prudential measures with respect to financial services, including measures necessary to protect investors and depositors or to protect the integrity of their financial system. A provision is being considered to safeguard transactions carried out by a central bank or monetary authority in the pursuit of monetary or exchange rate policies.

6. Binding obligations will apply to tax measures with respect to expropriation and transparency. In addition, a “political declaration” would recognise the importance of the principle of non-discriminatory treatment in taxation of foreign investors and their investments. The non-discrimination disciplines on tax measures in bilateral treaties would continue to apply.

7. The protection and conservation of the environment, sustainable development, and labour standards and are being addressed in several ways. Negotiators are considering appropriate references in the Preamble, specific provisions in the text, and the association of the OECD Guidelines which contain chapters on environmental protection and on employment and industrial relations.

II. *Dispute Settlement*

8. The MAI will have an effective dispute settlement mechanism designed to cover all obligations under the MAI. The mechanism encourages, in the first instance, dispute avoidance and the resolution of disputes through informal procedures including bilateral and multilateral consultations. For investment disputes covered by the MAI which cannot be settled amicably, it envisages recourse to binding arbitration by States wishing to take action against another State (state-to-state arbitration) and for investors who choose to directly submit a case to arbitration against their host country (investor-to-state arbitration).

9. Under state-to state dispute settlement, the Parties in dispute must first try to reconcile their differences through consultations. Failing a mutually satisfactory solution, any of the disputing Parties may submit the dispute to an arbitral panel constituted under the rules and procedures set up in the agreement. Awards issued by an arbitral panel are final and binding on the Parties to the dispute.

10. Delegations are continuing to consult on the major substantive issues for which some have expressed reservations or concerns, including the role of the Parties Group as a forum for multilateral consultations that would precede state-to-state arbitration; the question of when a dispute is ripe for arbitration, the types of relief that could be awarded by an arbitral panel, and the permissible countermeasures that could be taken to enforce compliance with an arbitral award.

11. Investor-to-state arbitration is a key feature in most bilateral investment protection treaties. It permits investors to activate dispute settlement directly and thereby helps to de-politicise investment disputes. Under the MAI, an investor may choose to submit a dispute for resolution among the different options provided for in the agreement. MAI Parties, by entering into the agreement, give prior consent to submission of a covered dispute to arbitration under one of the different options identified in the MAI. The agreement also specifies the forms of relief that awards of any of the selected tribunals can provide.

12. Some delegations maintain reservations on prior consent to investor-to-state dispute settlement and would limit the scope of these procedures to treatment in the “post-establishment” phase.

III. *Exceptions*

13. The overall approach of the MAI is a comprehensive, high standards agreement with limited exceptions. As in other international agreements, Contracting Parties may take measures to protect their essential security interests and to fulfil their obligations under the United Nations Charter concerning the maintenance of international peace and security. Work has advanced on the basis of a Chairman's proposal for this and public order.

14. In view of the broad definition of investment, a safeguard provision has been drafted to allow temporary dispensation from national treatment and the free transfer obligations, in the event of serious balance of payments and external financial difficulties or where capital movements cause serious difficulties for monetary or exchange rate policies. Recourse to the safeguard clause would be subject to surveillance by the Parties Group and the IMF.

15. Country specific exceptions could be lodged to certain obligations of the MAI. In most cases, Contracting Parties would list any existing non-conforming measure ("grandfathering"), and the introduction of more restrictive measures would not be permitted ("standstill"). Exceptions recorded in this way would be subject also to a ratchet mechanism which would automatically lock in future liberalisation.

16. Proposals are being examined to permit future departures from certain MAI obligations for specific categories of measures or sectors. A clause relating to measures taken by regional economic integration organisations (REIO) has been put forward, a general exception has been proposed for cultural industries and special treatment is being considered for certain activities where the GATS or other international agreements play a role, or where there are national sensitivities. Negotiators are exploring ways to limit the scope of such exceptions and to subject them to specific disciplines, including notification and consultation. It is a widely shared view that the dispute settlement mechanism would apply to disputes arising over whether a particular measure is covered by an exception.

17. The MAI has also been designed as an instrument for the liberalisation of investment regimes. The MAI could set a framework for gradually moving towards increased liberalisation in a number of ways. Proposals are being examined, including periodic sectoral and horizontal reviews by the Parties Group and a provision for future rounds of negotiations.

IV. *Other Provisions*

18. The 1976 OECD Guidelines for Multinational Enterprises are likely to be part of the MAI package. The Guidelines are voluntary standards of conduct for multinational enterprises representing the collective expectations of governments as concerns investors responsibilities vis-à-vis the countries in which they operate. Their association with the MAI would not change their voluntary, non binding status. Contracting Parties would be associated to follow-up procedures, including the nomination of National Contact Points and future revisions of the Guidelines.

19. Negotiators have been careful to ensure that the MAI would be compatible with other international agreements, including the IMF and the WTO. The MAI will not create obligations on Parties that conflict with their obligations under those agreements. It has been agreed that cross-border services are not covered by the MAI; consideration is being given to whether the agreement should include specific language to this effect.

20. Signatories to the Final Act and to the Agreement would take part in a Preparatory Group which would prepare for ratification of the agreement. By a date to be determined, Signatories of the Agreement would meet to determine the date for entry into force of the agreement. Thereafter, a Parties Group would be formed to facilitate the operation of the agreement. As a general rule, Parties would be expected to try to reach agreement by consensus but there may be a need for a different voting rule in certain cases, for example in budgetary matters.

21. The MAI would be open to participation by non-OECD Members that are willing and able to meet its obligations. Non-Members would be able to negotiate the conditions of their adherence and in particular their list of country specific exceptions. The particular situation of the non-Member wishing to join the MAI would be given careful consideration.