MULTILATERAL AGREEMENT ON INVESTMENT
State of Play as of July 1996

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FOREWORD

The following is a selection of papers presented at the conference on “Investment Policies in Latin America and Multilateral Rules on Investment”, held in Rio de Janeiro, Brazil, 16-18 July 1996. A publication of the full proceedings is currently under preparation and should be available by the end of this year.
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THE MULTILATERAL AGREEMENT ON INVESTMENT: ORIGINS AND STATE OF PLAY

Ambassador Alan Larson

1. Background to the Negotiations

The roots of the MAI lie in the recognition of the increasing importance of foreign investment to the world economy. In the past some saw foreign direct investment as a substitute for international trade; later it was viewed as a complement to trade. Today companies see trade and investment as inextricably interlinked; they invest in order to trade and they trade in order to invest. Service industries, the fastest growing sector of most modern economies, find it necessary to have an in-country presence in order to build and sustain markets. Manufacturing industries find that foreign production facilities often can help make world-wide distribution of their products more efficient, and that a local presence can help them to provide better customer service and to undertake R&D to adapt their products to local market requirements.

In recent years, world-wide investment flows have been growing faster than trade flows. The total stock of foreign direct investment was around $2.6 trillion in 1995, up from $1.2 trillion in 1988. This increase in FDI has not been limited to OECD countries. Eastern Europe, Asia and Latin America have all become important hosts of foreign direct investment. In Latin America and the Caribbean for example, foreign direct investment flows have more than doubled in only four years, increasing from $9 billion in 1990 to $20 billion in 1994. Many of these same countries, especially those in Asia, are becoming sources of foreign investment.

OECD countries have long recognised the importance of FDI to their economies and the benefits they could gain from investment rules and disciplines. The OECD national treatment instrument established a basic standard of non-discriminating treatment of foreign investors. In addition, the OECD capital movements code was a powerful force for the liberalisation of financial flows among OECD countries. In the late 1980's OECD countries sought to take another step forward by making legally binding the political commitments represented by the national treatment instrument. Interestingly, it was the failure of this effort that led OECD countries to decide that they should be more ambitious, not more cautious. It was this determination to develop a state-of-the-art agreement with binding dispute settlement rules that led to the launching of negotiations on the Multilateral Agreement on Investment (MAI). The OECD established a series of working groups which began analysing the feasibility of a multilateral investment agreement back in 1991. This effort culminated in the mandate issued by OECD

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1 Ambassador Larson is Vice Chairman of the OECD Negotiating Group on the Multilateral Agreement on Investment. (Mr Frans Engering of the Netherlands is the Chairman of the Negotiating Group, Mr Akitaki Saiki of Japan, is also a Vice Chairman.) Ambassador Larson is also Acting Assistant Secretary of State for Economic and Business Affairs and, in that capacity, provides leadership on policies including, trade, telecommunications, energy, finance, transportation and economic sanctions. This presentation presents his assessment; not every MAI negotiator would necessarily agree with every detail.
Ministers in May 1995 to negotiate an MAI with the ambitious goal of completing negotiations by the May 1997 Ministerial.

The mandate of the OECD Ministers is for an MAI which provides a broad multilateral framework for international investment, with high standards for the liberalisation of investment regimes and investment protection, and effective dispute settlement procedures. The MAI is to be a free-standing treaty open to all OECD Members and the European Community, and to accession by non-OECD member countries. Because OECD members welcome the interest of non-member countries in possible accession to the MAI, the OECD and its members have undertaken numerous activities designed to provide information to those non-members who may be interested in possible accession to an MAI. This forum is part of that effort, and I hope you will help us by sharing your views with us today.

Some have voiced concern that the members of the OECD are attempting to negotiate an agreement which they intend to impose on non-OECD countries. Nothing could be farther from the truth. As I noted at the outset, the OECD has a long history of involvement in investment policy. Over the years its members have developed a set of investment rules which through the ongoing work of the relevant OECD committees have resulted in a substantial increase in the liberalisation and protection of foreign investment among members. The OECD countries have decided to build on this success through the negotiation of a comprehensive agreement on investment, because doing so is in their own economic interest.

OECD countries seek a high standards agreement because we profoundly believe that protection of foreign investment and continuing liberalisation enhance our economic welfare. We believe this is also the case for non-members of the OECD, and for this reason, we will welcome those non-member countries which share our vision. The door is open, but no-one - not even members of the OECD - will be forced to walk through it.

The principles which are finding their expression in the MAI are basically the same as those which underlie the bilateral investment treaties of the United States and other OECD countries. A number of countries in this hemisphere have concluded BITs with the United States and other OECD countries because they perceive that their own economic development interests are served by commitment to an open and protective regime for foreign investment. I believe the same logic will motivate a number of countries from outside the OECD to consider accession to the MAI. But, this is their choice to make.

2. Status of the Negotiations

Negotiation of the MAI began in earnest in September of last year, and has been going virtually non-stop since that time. All OECD member countries participate, as does the Commission of the European Community. The WTO is an observer, and various other organisations, such as the IMF and the International Centre for the Settlement of Investment Disputes, are present when needed.

OECD countries have established a Negotiating Group chaired by a senior and highly respected Dutch official, Frans Engering. The Negotiating Group generally holds an orientation debate on issues, then sends specific matters to expert groups for further development, or to drafting groups when there is substantial agreement on basic principles. These subsidiary groups report back to the Negotiating Group, which has the final authority on all matters relating to the MAI.
The Negotiating Group reported to the May 1996 Ministerial that the negotiations were on course, and that broad agreement had been achieved in several key areas. It is now possible to discern the basic outlines of the MAI.

The MAI will provide comprehensive coverage through a broad definition of "investor" and "investment". The definition of investment will be a single definition that covers tangible and intangible assets, and applies not only after an investment is made (post-establishment) but also to the period before (pre-establishment). In drafting these definitions, we have been guided by the desire to cover all relevant forms of investment.

Basic agreement on the principles of investor protection was achieved quickly. A drafting group has prepared draft provisions covering the general standard of treatment, compensation in the event of expropriation, protection from strife, free transfer of funds and subrogation.

There is also substantial agreement as to the standard of treatment of investors and investments. The cornerstone of the MAI is the principle of non-discrimination as between domestic and foreign investors (national treatment) and among foreign investors from different nations (MFN). Provisions have been drafted on national treatment, most-favoured nation treatment and transparency obligations that are to apply both pre and post-establishment. The same drafting group identified mechanisms for achieving standstill and rollback, and for listing of country-specific reservations to the basic commitments. Such mechanisms are essential to achieving liberalisation. Still under discussion are general exceptions to the basic obligations, such as protection of national security, public order and international peace and security. We are also considering whether there is a need to provide for a temporary, and perhaps partial, derogation in case of balance of payments difficulties.

My fellow Vice Chairman, Akitaka Saiki, established the standard for dispute settlement provisions within the MAI when he stated that they should be simple, clear, efficient and effective. There is broad support for procedures that will encourage amicable solutions to investment disputes. There is also a broad-based desire to provide for binding arbitration, not only for disputes between states but also for disputes between an investor and a state. By offering a private company the right to initiate binding arbitral proceedings against a state, the MAI would go beyond the state to state dispute settlement mechanisms common to trade agreements.

In addition to these core areas of treatment and protection of investors and their investments, the MAI negotiations are examining a number of important related issues. Among the most important of these is the issue of taxation. Most believe that taxation is addressed effectively in a vast network of bilateral tax treaties. These tax treaties were developed in the OECD and serve to harmonise tax treatment and prevent double taxation.

The MAI negotiators are looking at possible additional disciplines in a number of areas which, for want of a better term, have been lumped together under the rubric "Special Topics". Foreign investors want substantial freedom in deciding who should be employed in their foreign facilities, consistent with the application of immigration laws. They want to bring in key management and supervisory personnel, or hire them locally without regard to nationality. They also want to be free from requirements that they hire a given number or percentage of local nationals.

Performance requirements policies that condition establish or receipt of a benefit on local procurement or export of a product, distort investment and trade decisions. In recognition of this fact, MAI negotiators are considering means to discipline performance requirements, even where they are imposed on a non-discriminatory basis.
Investment incentives pose a particularly difficult challenge. At times they may offer foreign investors better treatment than that afforded domestic firms. While some OECD countries would wish to achieve disciplines that would reduce distortions, many countries see investment incentives as legitimate tools for attracting additional investment. Overall commitments to MFN and transparency should be possible.

The Negotiating Group is also working on how to provide for greater application of non-discrimination and transparency principles when governments privatise state enterprises or open up previously monopolised sectors of the economy.

Although good progress has been made so far, we have a heavy workload ahead of us.

One subject that will require considerable attention is dispute settlement. Since many of the special topics could lead to negotiation of new, unprecedented disciplines, negotiators are likely to proceed cautiously.

The Ministers of the OECD countries have stressed their determination to have an agreement that results in significant liberalisation. Country specific deviations from the standards of the agreement should be trimmed back significantly. The negotiations of meaningful, new opportunities for foreign investment will be a major task over the course of the next year.

The Negotiating Group will also need to consider the request of some parties for special treatment of Regional Economic Integration organisation. Others have suggested special treatment of industries they classify as significant in preserving cultural or linguistic diversity.

It is expected that obligations of the MAI would be binding at all levels of government. For some OECD countries with federal structures, this may raise constitutional or political issues.

3. Accession

I would also like to say a few words about the accession process. We have had only a preliminary discussion of this issue among the negotiating parties, but there appears to be a convergence of views on a few points. Like any OECD member, any non-member of the OECD would be expected to negotiate the conditions of its accession. This does not mean, of course, that the core provisions of the agreement would be open to renegotiation. Rather, recognising that most if not all countries will have existing laws or regulations which do not conform to all the basic obligations of the MAI, all prospective signatories - OECD states and non-OECD states alike - will be expected to negotiate with other parties regarding which of these measures may be allowed to persist through narrow exceptions or reservations, and which will need to be adjusted to conform to MAI obligations. Consideration is being given to a possible transition period in relation to the full implementation of some obligations.

In general, the negotiations have been characterised by enthusiasm for the goal of achieving a high standards agreement, and creativity in fashioning acceptable solutions to difficult problems. I expect this to continue. I also remain confident that we will bring this negotiation to a successful conclusion.
4. **Conclusion**

In closing, let me emphasise again the importance I attach to hearing your views on all aspects of the MAI, not only regarding the substantive provisions of the treaty, but also the accession process. Your participation here today presumably signifies interest in the MAI. As you become more familiar with it, many of you may decide that being a signatory of the MAI could bring substantial potential benefits for your own countries.

Certainly being a signatory of the MAI could send a strong positive signal to potential investors. This could be an important tool in marketing your countries as locations for foreign investment. In addition, many of your countries are becoming significant sources of outward investment. Should you become members, the MAI offers the potential of providing significant improvements in access to the markets of, and protection for your investments in, other MAI parties.

Ultimately, the decision whether to pursue membership in a future MAI will be a decision each of your countries will have to make for itself based on a careful assessment of its benefits. To make that judgement, you need information. We are here today to continue the process of providing it. Those of you who are prepared to meet the high standards to which we aspire, will find the OECD countries open to serious dialogue on your possible accession.
1. Introduction

The MAI provisions on “Investment Protection” deal with the following issues:

“The general treatment of the investor and the investment, expropriation, protection from strife, transfer of funds, subrogation, and protection of investor rights arising from investment agreements between the investor and the host country.

Considerable progress has been made on these issues and there is now a complete draft on investment protection, although there is not yet agreement on everything.

The rapid progress is due primarily to the fact that there was no disagreement on the fundamental principles concerning investment protection. Furthermore, models that had already been developed in our bilateral investment protection treaties could be referred to. Although the intention was not to “reinvent the wheel”, we nonetheless wished to put in some more spokes in order to strengthen the whole vehicle.

2. The provisions on investment protection

2.1. General treatment

It is stated in this introductory article to investment protection that investment shall receive fair and equitable treatment in the host country as well as full and constant protection and security. Treatment must not be less favourable than that required by international law. This will be a binding provision; it is not intended to be simply a preamble to the rest of the chapter. While it was easy to agree upon this in principle, one question has not yet been solved.

There is still disagreement whether - in addition to the above-mentioned principle - all “unreasonable or discriminatory measures” of a host state shall be prohibited with regard to the activities of an investment. Some think that not each and every discrimination should be forbidden and therefore suggest that only a measure that is both “discriminatory and unreasonable” should be considered a violation of the MAI obligations. Others are of the opinion that the standard of “fair and equitable treatment” is sufficient in this respect.

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2.2  Expropriation

As in the case of the “general treatment” article, it was not very difficult to come to an agreement concerning the “building blocks” of this provision. An expropriation, or any other measure having similar effects, whether directly or indirectly, is permitted only if it is in the public interest, on a non-discriminatory basis, against payment of prompt, adequate and effective compensation, and in accordance with due process of law. The terms “prompt, adequate and effective”, “due process of law” were then defined in more specific detail:

♦ “Prompt” means without delay;

♦ “Adequate” means that compensation must be equivalent to the fair market value of the investment immediately before the expropriation took place without any deduction due to the fact that the pending expropriation became publicly known in advance

♦ There is still disagreement upon what “effective” shall mean. All share the view that compensation has to be fully realisable and freely transferable. However, some delegations suggested that compensation also has to be paid in a “freely usable” currency. The IMF recognises currently five currencies as “freely usable” (US dollar, Japanese yen, French Franc, pound sterling, and German mark). Others think it would be sufficient if the currency is “freely convertible”;

♦ Due process of law” includes the right of an investor to have its case reviewed by a judicial authority or other independent authority of the host country.

Furthermore, delegations agreed in principle that if payment of compensation is delayed, the host country should not only pay interest, but also bear the exchange rate risk. This means that in case of a devaluation of the host country’s currency between the time of expropriation and the time of actual payment, the host country would have to compensate the investor for this devaluation.

It is not yet clear how this principle should be reflected in the MAI. Some think the requirement that compensation has to be “adequate” would already take care of a devaluation if the host country’s currency devaluates and thus compensation would no longer be adequate.

Another group is of the opinion that the MAI should explicitly deal with the exchange rate risk. Without going into too much detail, there seems to be - in principle - two possibilities to do this. First, one could state that compensation must be calculated in a “freely usable currency” at the exchange rate on the date of expropriation. However, we would still have the exchange rate risk with regard to all such currencies that are not freely usable. Second, one could state that only a devaluation of the host country’s currency against the home country of the investor matters, or against any other currency that the investor designates.

3. Protection from strife

This provision deals with the situation where an investor suffers losses in the host country due to war, any other armed conflict, state of emergency, or similar events. In principle, the host country shall not be obliged to pay compensation in such cases. Rather, the draft MAI provision stipulates that if the host government decides to pay compensation, then the principles of national treatment and most-favoured nation treatment shall apply. However, there are two situations where there exists an obligation to pay: 1)
in the case where the armed forces of the host country requisition the property of the investor; and 2), in the case where property is destroyed by the armed forces of the host country as long as this demolition was not required by the necessity of the situation. Compensation in such cases has to be prompt, adequate, and effective.

4. Transfer of capital

The draft text confirms that all payments into and out of the host country related to an investment may be freely transferred without delay at the market rate of exchange prevailing on the date of transfer. We give a list of examples as to what payments fall under this provision (e.g. the initial capital to make the investment, returns, payments of compensation, payments under a contract, proceeds from the sale or liquidation of the investment, payments arising out of the settlement of a dispute, earnings and other remuneration of personnel).

Four main issues have not yet being resolved. First, there is the question of whether we need a “balance of payments” clause. While several delegations think that the free transfer should be an absolute obligation and that, even in a balance of payments crisis, there is not really a need to restrict foreign direct investment, others hold the view that a government needs to maintain its possibility to control all kinds of payments in an actual crisis. Or at least a host country must have the right to restrict transfers in so far as the IMF-Agreement allows it to do so. Much depends on how broadly “investment” will be defined under the MAI.

Second, there is still a debate whether we need a provision according to which the MAI transfer article does not affect the host country’s right to apply its laws of general application, e.g. its criminal laws or its laws to protect creditors. Furthermore, it still has to be decided whether the MAI shall include a provision that allows a host country to collect investment-related information for statistical purposes.

Third, as in the case of the article dealing with expropriation, there is the question whether contracting parties have to ensure that transfers can be made in a “freely usable” or “freely convertible” currency.

Fourth, discussions are going on as to whether we need a clause dealing with the situation where there is no market rate of exchange at the date of transfer. Several delegations suggest that in such a case the rate to be used shall be the most recent exchange rate for conversion of the currencies concerned into Special Drawing Rights.

5. Subrogation

This article reflects a well-known principle. In case the home government of an investor, or its designated agency, pays compensation with regard to a loss that the investor has suffered in the host country, the former country enters into all the rights and claims that the investor has vis-à-vis the host country. There is almost complete agreement that the MAI should contain such a provision. However, there are still some questions to be resolved in connection with dispute settlement following subrogation. Furthermore, it is not yet clear whether this provision should deal only with claims arising from “non-commercial risks”.
6. Protection of investor rights arising from other agreements between the host country and an investor

It was discussed whether the MAI should contain a provision according to which each contracting party shall respect any other obligation it has undertaken in an investment agreement or contract with a specific investor. As a consequence, a breach of such an investment agreement could amount to a violation of the MAI.

At the moment, there are three options on the table. First, the MAI would not contain such a provision at all; second, only the MAI dispute settlement mechanism would be available in case there is an alleged violation of the investment agreement; third, the MAI would contain a so-called “respect clause”, including the possibility to have recourse to the MAI dispute settlement mechanism. The main difference between the second and third options would be that in the case where there is only a dispute settlement provision, the breach of the investment contract by the host country would not necessarily amount to a violation of the MAI. Consequently, neither the investor nor the home country would be entitled to the specific remedies that the MAI or customary international law (“pacte sunt servande”) might provide in such a case.

Furthermore, it remains to be decided to what extent the MAI should specify the kind of investment agreements that would fall under the scope of this provision. Another open question is whether the provision should cover only contractual relationships between the investor and the host state, or any obligation that the latter has with regard to an investor (including unilateral commitment).
DEFINITION AND TREATMENT OF INVESTMENT AND INVESTORS

Thierry Francq

1. Definition of investment and investors

The question of definitions is a central issue since it concerns the scope of the Agreement. It may also turn out to be a delicate one as it raises questions which cover important stakes: how far should the accepted meaning of the term "investment" be stretched? Will certain companies not established by the Parties to the MAI be entitled to the advantages of this Agreement? The Negotiating Group has not yet finalised discussions, but an outline is becoming clear.

1.1 What will "investment" mean in the MAI?

The Negotiating Group quickly agreed on the following two principles:

-- The MAI should cover a broad investment concept, i.e. a concept which exceeds the narrow traditional definition of foreign direct investment (creation of new companies, loans of more than five years, acquisition of interests of over 20 per cent). Today, this definition no longer covers all forms in which an enterprise or an individual may acquire a long-term interest in a foreign country;

-- Conversely, investment should not correspond to all capital movements; purely monetary or purely speculative flows do not follow the same reasoning.

In other words, the MAI will be situated between these two extremes. Technically, however, borderlines will be very hard to determine.

In order to overcome the difficulties of definition, the Negotiating Group decided to use an asset-based definition (which is often presented as the modern investment definition) instead of an enterprise-based definition. This definition could include both a positive list and a negative list in order to ensure optimum clarity and precision.

The definition should cover the following:

-- shares and forms of interest in the capital of enterprises;
-- bonds and loans taken out by enterprises;
-- rights under contracts;
-- intellectual property rights;
-- at least part of movable and real property;
-- derivatives whose underlying references are covered by the definition.

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Treasury Division - Multilateral Affairs, Ministry of Economy and Finance, France.
The following raise difficulties and should therefore be excluded from the definition:

-- public debt (for reasons of sovereignty advanced by certain members);
-- receivables on business transactions;
-- cash or near-cash receivables;
-- movable and real property acquired for personal use;
-- derivatives whose underlying references are not covered by the definition.

In conclusion, the MAI has an extremely ambitious approach, starting with a broad definition of investment which includes elements underlying investments in recent times (rights under contracts, intellectual property rights, derivatives). This clearly reflects the intent to reach a state-of-the-art agreement. The objective is to cover all investments resulting in the acquisition of actual interests in the activity of a foreign country.

**How is an investor defined in the MAI?**

This is also an issue, which should be of some interest to non-Member countries, on which negotiations have not yet been entirely finalised. Certain points, however, have been confirmed. As regards individuals, an investor is defined as any individual who is a national or a permanent resident of a country that has signed the MAI. The Negotiating Group managed to agree on the broadest possible definition.

The main discussion concerns corporate bodies, whether profit-oriented or not, as it has not been determined whether the agreement will cover indirect investments. There are two possible solutions:

-- the first is based on a "territorial" concept and does not factor in ownership of the capital, i.e. all legal entities established in the territory and under the law of one of the signatories with a substantial business in such country. Under this definition, the benefit of the agreement would not be granted to the subsidiaries of member-country enterprises established in a non-member country;

-- the second possibility is based on the concept of ownership (or control), i.e. all enterprises held directly or indirectly by persons residing in the territory of a MAI signatory. Thus, under this definition the benefit of the agreement would not be granted to entities established in countries having signed the Agreement but controlled by a third country.

There are, at best, two typical positions in the ongoing negotiations:

-- some Members would like the definition to be as broad as possible and thereby include all enterprises established in a member country, as well as entities established in other countries and controlled by a resident of a member country;

-- others, such as France, would like to follow a "territorial" approach, consistent with their legal tradition, but would also like to limit the benefit of the Agreement to entities of states subject to the obligations of the Agreement.
2. Treatment of investment and investors

2.1 On which principles will the liberalisation obligations be based?

The MAI is intended to lay down clear and strict foreign investment standards which the contracting parties should apply at all government levels, including local level. This freedom of investment will apply both to treatment of investment as an act or intention (the "pre-establishment" phase) and to treatment of investment after completion (the "post-establishment" phase).

The MAI will hinge on three well-known liberalisation principles:

-- **national treatment**: this is the essence of the agreement. Under the MAI, the signatories undertake not to grant less favourable treatment to foreign investors than to national investors. In other words, the MAI will not only forbid *de jure* discrimination but also *de facto* discrimination;

-- **a most favoured nation clause**: if States cannot grant national treatment in certain areas, and therefore file for reservation of national treatment, the most favoured nation clause will guarantee that such States grant the same treatment to all MAI parties.

These two principles are based on a comparison between the situation of both foreign investors and national investors, by virtue of which foreign investors should be treated at least as favourably as national investors. It has not yet been settled whether this point should be included explicitly in the agreement; in other words, whether it is possible to discriminate against foreign investors who are not in similar circumstances as national investors.

-- **transparency**: to ensure adequate information for foreign investors on the legal framework of each State, MAI signatories will undertake to disclose their policies, including any not formally laid down.

It has still not been settled whether MAI should go even further and cover access to the market, i.e. which non-discriminatory measures may be taken by the States (regulations, regulated professions). A discussion is also underway to determine whether, on the model of the bilateral investment protection agreements, the States should accept more general commitments, e.g. the agreement to treat foreign investors justly and fairly. Some parties believe that national treatment offers the best guarantee of just and fair treatment, while others believe that these aspects should be added to the agreement.

2.2 To which extent and on which conditions is it possible to derogate from the liberalisation principles?

Ideally, there would be no derogation from the principles of the Agreement. Two comments may be made about this, even if the discussions are far from over:

a) At the request of OECD Ministers during their most recent meeting, the MAI will be very ambitious in this area. Its ambition is reflected in two types of provisions:

   -- the agreement will be based on a *standstill* agreement and a *rollback* principle: the parties will not be entitled to add non-conforming measures once the agreement has been signed. They will only be entitled to liberalise in the future.
   
   -- above all, the agreement will follow a *top-down*, rather than a bottom-up, approach. Using a bottom-up approach, such as the one applied by the WTO, only declared sectors are covered by an agreement. The MAI follows the opposite approach: for example,
only those sectors which are explicitly excluded by a party are not entitled to national treatment. This is obviously much more restrictive.

(b) Three types of provisions will enable the signatories to derogate from the principles of the agreement:

-- *National reservations.* States will have to disclose all non-conforming measures which they maintain at the time the MAI is signed or at the time they join. Clearly, the financial negotiating phase will focus on such a list and seek to establish commitments which are as open as possible. Once the agreement has been signed, signatories will no longer be entitled to add new non-conforming measures.

-- *General exceptions.* Under these exceptions, States would have the possibility to take the measures necessary to ensure compliance with certain general objectives. Such exceptions could be granted for reasons of national security, public law and order, and peace. The question of a "cultural exception" intended to protect linguistic and cultural diversity is also under discussion. Lastly, talks are in progress to determine how to limit abuses which could result from such provisions.

-- *Temporary derogation:* the definition of investment should be very broad and therefore cover most of the balance of payments. Accordingly, a temporary derogation clause in case of serious problems with the balance of payments could be inserted.
1. Introduction

The rules on national treatment and most favoured nation treatment are the cornerstones of the MAI. However, in some areas it has been felt that the application of these rules would not be enough so as to reach an appropriate level of openness of investment markets. In other areas, the key provision may need some elaboration in order to fit particular circumstances. Consequently, additional disciplines, over and above the general rules on non-discrimination, might be needed if the MAI is to become the high standard, state of the art agreement that negotiators are aiming for.

Against this background, the Negotiating Group has identified six "Special Topics", some of which are probably of particular interest to Latin American countries. An Expert Group has been set up and asked to consider relevant aspects of these issues, which are key personnel, performance requirements, investment incentives, privatisation, monopolies/state enterprises, and, finally, corporate practices.

The Expert Group has been mandated to "... make proposals, including proposals for text where appropriate, to the Negotiating Group at its session in September 1996".

The group has met twice and discussed all issues once. The report to the Negotiating Group will be finalised in September, whereafter the report will be presented to the Negotiating Group. Thus, there are so far no final results from the Expert Group.

The work of the group has been conducted on the basis of "orientation debates" that have been held in the Negotiating Group. The working method has differed between issues. In some cases, experts have set out to consider completely new provisions. In other areas, they have sought to develop existing rules in other international agreements, such as WTO agreements and NAFTA. In all fields, the discussion has been held against the background of the possibility for countries to seek reservations for non-conforming measures and without going into issues relating to standstill and roll-back.

The following sections introduce the main issues at stake and point to opportunities and difficulties at this stage of the still unfinished process.

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2. Key Personnel

Corporations investing abroad attach considerable importance to being able to freely transfer and hire personnel to perform key functions. Problems in relation to key personnel might put an investment at risk and the business community would generally like the MAI to contain rules guaranteeing the right of temporary entry, stay and work for key personnel. Addressing these concerns has become a real challenge for the governments negotiating the MAI.

The Expert Group has confirmed that the MAI should contain provisions on key personnel. The working hypothesis is that these provisions should be legally binding. However, the precise scope of the rules has not yet been determined. For instance, the questions pertaining to which personnel should be covered and under what conditions remain to be answered. The specific categories of investors, executives, managers and specialists are being examined. Considerable importance is attached to the relationship between any MAI rules and national immigration and labour laws. At the same time, experts are studying different options on how to guarantee the right to key personnel to enter, stay, and work in the country where the investment is made without the application of economic needs tests and unduly burdensome bureaucratic procedures. The Expert Group is also considering the need for rules concerning the freedom to hire individuals that are already lawfully in the country where the investment has been made and possible rules relating to spouses and children of key personnel.

3. Performance Requirements

It has been felt that the application of national treatment and most favoured nation treatment would not be sufficient to tackle investment distortions and inefficiencies created by performance requirements. There is general agreement that the MAI should prohibit a number of performance requirements in order to secure a liberal investment climate.

It is probably safe to say that discussions by the Expert Group in this area have advanced a long way. On the basis of existing rules in the WTO TRIMs agreement and NAFTA, the experts have developed, and are now examining, a specific proposal that would seek to focus more directly on performance requirements that distort investment flows. The proposal includes a prohibition of export requirements, local sales, content and production requirements, as well as employment and investment requirements. Thereby, the provision would go beyond existing rules in, for instance, the TRIM:s agreement.

The expert group has looked at both mandatory performance requirements and performance requirements that are linked to the granting of a benefit to an investor. While it would seem easier for some delegations to go further in prohibiting requirements of the former type, other delegations, constituting the majority, see no need to distinguish between the two and believe that prohibitions ought to be far-reaching for both categories.

4. Investment Incentives

The discussion on investment incentives involves issues that are both technically complex and politically sensitive. Most countries today actively promote foreign direct investment and the use of various forms of incentives has increased considerably. Consequently, governments often find themselves engaged in costly competition with others over particular investments.
The Expert Group discussions contained both pragmatic and ambitious views. The pragmatists, who constitute the majority, argue that companies should be able to continue to benefit from incentives and that the MAI should not interfere with how governments seek to promote investment beyond the limitations imposed by MAI rules on non-discrimination. Those who express a more ambitious view, however, would like to see disciplines that restrict even further investment incentives; this would include a prohibition on the "positive discrimination" of foreigners.

Against this background it may -- regrettably for some -- be difficult to develop far-reaching new disciplines on investment incentives within the time frame of the MAI negotiations. However, the experts agree in principle that the rules on national and most favoured nation treatment should be applied to incentives. This would certainly mean that a considerable level of discipline be introduced, even if it is recognised that the application of these rules to incentives for "one off-investments" might cause some difficulties. In order to give more time for analysis and possible elaboration of new rules, the suggestion that MAI should mandate further work on investment incentives after the entry into force of the agreement has gained a fair amount of support in the Expert Group.

5. Monopolies and state enterprises

In a sector where a state monopoly exists there is obviously no room for private investors, be they foreign or domestic. The presence of state enterprises with exclusive rights may have similar consequences. The Expert Group is considering how to cope with this on the basis of more or less satisfactory rules in other agreements such as GATT, GATS and NAFTA.

In order not to interfere with competition policy, the experts have agreed that a MAI provision should concentrate on monopolies and state enterprises that have been designated or given an exclusive right by the government. There is agreement that national and most favoured nation treatment should apply to covered monopolies and state enterprises, i.e. they should not be allowed to discriminate foreign investors, for example, in their sales of goods or services. The same standard should apply to government designated monopolies that are exclusive buyers of goods or services. Generally speaking, however, experts are of the view that MAI should not cover government or public procurement.

6. Privatisation

Privatisation has recently become an increasingly important activity in many countries. Consequently, privatisation has been identified as a "special topic" in need for examination. This is an area where it might be possible for MAI to break new ground since privatisation as such is not presently subject to OECD rules.

A large majority of participants in the Expert Group agrees in principle that national and most favoured nation treatment should apply to all phases of the privatisation process, giving foreign investors a right to participate. However, privatisations carried out via direct sales, as opposed to public offerings, have been identified as a potential problem in relation to the application of national treatment. Questions have also been raised concerning various measures which are seen by many as facilitating privatisation, but which according to others might reduce the opportunities of foreign investors (for example, the use of "special shares", management buy-outs, and other forms of participation programmes). It has also been suggested that a MAI provision on privatisation should contain tailor-made rules on transparency.
7. Corporate Practices

It is not only government measures that may distort investment flows between countries, but also actions taken by individual firms, i.e. "corporate practices", which can negatively impact on foreign investment.

A large majority in the Expert Group feels it is neither appropriate nor possible for MAI to interfere with the private practices and decisions of specific companies. Under national and most favoured nation treatment governments will be prevented from requiring that companies act in a way that is discriminatory; however, what private entities decide to do in their own right is not, and should not according to the majority, be covered by MAI.

As an alternative binding rule, the Expert Group is also examining the possibility of introducing in the MAI a best efforts clause along the lines of GATS article IX on "Business Practices". In addition, experts are considering specific rules on transparency that would help to overcome some of the concerns in this field.

8. Conclusion

From what has been stated above, it is clear that much work remains to be done on many of the issues presented. The Negotiating Group will have to decide how to bring the work forward after the September 1996 meeting.
A CONCEPTUAL FRAMEWORK FOR AN MAI DISPUTE SETTLEMENT MECHANISM

by
Marino Baldi

1. Introduction

This note sets out a possible conceptual framework for an MAI dispute settlement mechanism. While many options remain open, the broad outlines of a MAI dispute settlement system could be described as follows:

-- the MAI would encourage parties first to utilise informal methods of dispute avoidance or settlement, both bilateral and, as appropriate, multilateral;
-- there could be a non-adjudicatory role for a Parties Group;
-- there would be binding third party settlement through both investor-to-state arbitration and state-to-state arbitration;
-- the MAI could provide the prior consent by the Parties to such arbitration;
-- the compulsory state to state arbitral mechanism could be by ad hoc Panels, with certain institutional aspects, in particular a roster, at least indicative, of qualified arbiters;
-- for investor to state arbitration, the MAI would provide for use of existing fora;
-- arbitral awards would be binding on the Parties to the proceeding;
-- awards would not limit any legal discretion of a Party concerning the manner for bringing its measures into conformity with the MAI;
-- pecuniary awards would be enforceable in domestic courts, at least in investor to state cases; and
-- the MAI should expressly address and regulate the application of countermeasures in the event a Party fails to comply with an arbitral award.

In addition to the issues of prior consent and the reliance on ad hoc arbitration noted above, the principal open issues are:

-- which of the many rules on the composition of Panels should be adopted for state to state arbitration;
-- whether the roster should be merely indicative, or have special weight;
-- the rights of interested third Parties to participate in Panel proceedings;
-- whether and how to provide for joining disputes with common issues of law and fact;
-- what remedies to allow a Panel to impose beyond declaratory relief in state to state cases and declaratory and pecuniary relief in investor state cases;
-- whether to provide a right of appeal for state to state, or possibly even investor to state cases;
-- how, absent appeal, to deal with possible aberrant awards;

5 Ambassador Baldi is Chairman of Expert Group N°1 on Dispute Settlement and Geographical Scope. He is also Deputy Director of the Federal Office of External Economic Affairs, Berne, Switzerland.
-- how to provide for effective countermeasures in the event a Party fails to comply with an arbitral award, while safeguarding against unregulated unilateral countermeasures; and
-- The relationship between state-to-state and investor-to-state arbitration.

This paper does not address the issue of the scope of the dispute settlement system of the MAI as a whole, or that of its state-to-state and investor-to-state parts -- which may depend, to a certain extent, on the substantive obligations of the agreement. In addition, there remain many technical questions on which further work remains to be done at the expert level, to flesh out the dispute settlement system in complete detail.

1.1 Role and functions of a parties group

The primary role of a Parties Group would be to avoid disputes through the promotion of a reasonable and consistent interpretation of the MAI. It would also serve as a forum for discussing general problems or questions.

The Parties Group could consider any question relating to the interpretation or application of the MAI, while avoiding factual disputes concerning a particular investment.

The fact that a question submitted to the Parties Group for consideration is at issue in a particular dispute would be without prejudice to the right of a Party to the dispute to have recourse to dispute settlement.

At the request of any Party to a dispute or of the Party of an investor party to a dispute, the Parties Group would not address the disputed question while it was pending settlement under any of the other procedures provided for in the MAI.

The Parties Group could issue clarifications of any MAI provisions.

Clarifications would be limited to abstract explanation of the meaning of the agreement's provisions without reference to any specific case that might be the subject of dispute.

Clarifications would not be given any automatic or special binding legal effect, but would have the normal effect that resulted under customary international law, in particular the law of treaties. They would not legally affect private Party rights which had already been acquired in a final and binding settlement of a dispute.

The Parties Group would not adjudicate specific disputes or appeals from awards. However, some limited "safety valve" function regarding aberrant arbitral awards could be considered.

The Parties Group records could serve as a repository of dispute settlements on matters of general interest reached in the context of bilateral consultations, mediation, conciliation, or arbitration.

A State which has been a Party to consultations, mediation, conciliation, or arbitration would promptly inform the Parties Group of any settlement reached or award issued on a matter affecting the operation of the MAI, including questions of its interpretation.

The Parties Group could consider public disclosure of categories of reported settlements other than arbitral awards, the latter would be generally public.
No Party would be required to furnish the Parties Group information concerning a particular investor or investment the disclosure of which would be contrary to its laws protecting confidentiality.

The Parties Group may also become involved, in a limited way, at the stage of enforcement of an arbitral award should a Party fail to comply.

1.2. Consultations, conciliation and mediation

1.2.1 Bilateral consultations

A MAI Party would promptly enter into consultations when requested by:

a) any other MAI Party regarding any question of interpretation or application of the MAI, including the compatibility with the MAI of any measures actually taken or officially proposed by the Party (such requests would be notified to the Parties Group); or

b) an investor of another MAI Party regarding any measure actually taken which allegedly infringes rights afforded it under the MAI and which has resulted, or which it reasonably expects to result, in injury to it.

Consultations would be with a view to finding a mutually acceptable solution consistent with the MAI; positions taken in such consultations would be without prejudice to the positions of either Party on disputed issues in the event of formal dispute settlement proceedings.

a) A Party would not be entitled to initiate arbitration against another Party under the MAI unless it had requested consultation, identifying the issues in dispute, and had afforded that other Party 60 days within which to consult on them.

b) A consultation/cooling off period could also be required for investor to state arbitration.

1.2.2 Multilateral consultations

In the event a dispute between Parties concerning the interpretation of the MAI has not been resolved through bilateral consultations, either may raise it for consideration by the Parties Group. This would make explicit that the Parties Group could be used to initiate a form of multilateral consultations before a Party invokes binding arbitration. This might also be provided for with regard to an investor to state dispute by or with the agreement of the investor’s Party.

1.2.3 Mediation or conciliation

The Parties to a dispute:

a) should consider submitting the dispute to mediation or to conciliation under rules of the Parties’ choice;

b) may request the Parties Group Chairman to serve as nominating authority for a mediator or conciliator.
2. Binding third party dispute settlement

2.1 State to state arbitration

2.1.1 Scope and form

Any dispute between Parties concerning the interpretation or application of the MAI, including
the compatibility with the MAI of any measure or action taken by a Party, which has not been resolved by
a requested consultation, could be submitted to an arbitral Panel, at the request of any Party to the dispute.
This would, in effect, follow the WTO precedent which makes the admissibility of an issue in arbitration
depend on its having been raised for resolution through consultation.

There is very broad support for arbitration by ad hoc MAI Panels as the mandatory form of state
to state third party binding dispute settlement.

Arbitration under this provision would not apply to any dispute which was covered by a final and
binding investor to state arbitral award or under consideration by an ongoing investor to state arbitral
proceeding.

2.1.2 Final and binding awards

An arbitral award would be considered final and binding upon the Parties to the arbitral
proceedings.

2.1.3 Rules and procedures

The MAI would set out basic rules and procedures for state to state arbitration. The Parties
Group could supplement these rules consistently with the MAI. For particular disputes, the parties to the
dispute could agree to apply modified rules. The UNCITRAL rules could serve as default rules to fill
gaps.

2.1.4 Roster and panellist qualifications

A roster of potential panellists would be established and maintained by the Parties Group. Each
MAI Party could name three persons to the roster. Nominations would be for renewable fixed terms of
five years.

Persons serving as members of a particular Panel would be required to be impartial, independent
and free of conflict of interest. Persons would have to decline or withdraw from an appointment in case of
any existing or potential conflict of interest. A procedure could be included in the MAI for addressing
conflict of interest challenges in specific Panel proceedings.

2.1.5 Composition and size of panel

A Panel could be composed of three members, including a president, chosen by agreement of the
Parties to the dispute. Other options could include:
-- a three member Panel to which each Party selects one member and those two select the third;  
-- a five member Panel if the Parties so desire, or if a Party elects to name an arbitrator without the agreement of the other Party (in which case, the other Party would also unilaterally elect an arbitrator and the three additional members, including a president, would then be selected by agreement).  
-- a sole arbitrator if the Parties so agree.

If the Parties fail to designate one or more members or the president, those appointments would be made by an appointing authority after consulting with the Parties to the dispute.

2.1.6 Other rules and procedures

The Parties Group should be notified of the initiation of arbitration proceedings. This could be done by delivering a copy of a request to initiate an arbitration, identifying the matters in dispute.

MAI Parties not party to the dispute could be given an opportunity to present their views to the Panel on any disputed issue of interpretation of the MAI.

The MAI could include a provision for joining complaints along the following lines:

a) Where more than one Party wishes to submit to a Panel a dispute with common issues of law and fact, a single Panel should be formed to consider the disputes wherever feasible;  
b) If more than one Panel is formed, to the greatest extent possible the same persons should serve as panellists and the timetables of the proceedings should be harmonised;  
c) A Panel which has been formed to consider a dispute might be given the power to decide, upon the request of another MAI Party in dispute, to join that Party as party to the proceedings.

The substantive law to be applied would be the provisions of the MAI, but other international law would be relevant as concerns the interpretation and application of a treaty. Domestic law could be taken into account where it was relevant under the MAI and consistent with it.

The MAI should stipulate the remedies that a Panel could include in an award. These remedies are still being considered but they could include:

a) a declaration that a measure of a Party is incompatible with the MAI;  
b) the granting of a pecuniary award as relief for the violation of the complaining party’s rights up to the time of the award;  
c) the granting of a pecuniary award as prospective relief, applicable in the event of failure by the Party to bring its measures into conformity with the MAI;  
d) restitution in appropriate cases;  
e) a recommendation that a Party bring its measure into conformity with the MAI;  
f) such other relief as the Party concerned consents to.

Before issuing an award, a Panel could provide a draft to the parties to the dispute, who will have 30 days in which to comment. The Panel would consider those comments and issue its final decision within 30 days thereafter.
A copy of any final decision should be provided to the Parties Group which would make it publicly available, except to the extent a Panel, having considered the parties views, may have determined that it contains confidential business information or personal data.

2.2. Investor-to-state procedures

The question whether investor to state arbitration should cover all the disciplines of the MAI is still under consideration. The following proposal does not prejudge the outcome of this consideration.

At the choice of the investor, any covered investment dispute may be submitted for resolution:

a) to the courts or administrative tribunals of the MAI Party to the dispute;

b) in accordance with any applicable, previously agreed dispute settlement procedure; or

c) in accordance with the arbitration provisions below.

The MAI could include a provision to clarify the standing of an investor to invoke the MAI dispute settlement provisions. It also needs to be considered whether provision should be made here or elsewhere for subrogation.

MAI Parties give unconditional consent to submission of a covered dispute to arbitration under ICSID (if Party to ICSID), the rules of the ICSID Additional Facility, the UNCITRAL rules, or the ICC Court of Arbitration -- the choice among these being with the investor. Covered disputes are considered "commercial". MAI Parties could be encouraged to join ICSID.

Parties would be allowed not to consent for cases in which the investor has previously submitted the dispute under paragraph 36 a) or b), but this would not affect the right of an investor to submit a dispute to judicial or administrative tribunals for the purpose of seeking interim injunctive relief.

Consent would not apply to any claim submitted to a Party more than a fixed period of years (to be determined) from the date on which the investor knew or should have known of the matter giving rise to the claim, except in case of force majeur or other extenuating circumstances which could justify a longer period.

Consent might be subject to the right of a party to an investor-state dispute to invoke a short cooling-off period for consultation.

The designated appointing authority could be the Secretary-General of ICSID, who would be requested to consider to selecting persons on the MAI arbitration roster.

Non-ICSID arbitration would be held in a New York Convention state.

The MAI could make provision for joining or consolidating complaints:

a) Where more than one investor wishes to submit to a single Panel a dispute raising common issues of law and fact, they could submit a joint request to do so and would be treated as a single party for the purposes of formation of the Panel;

b) If more than one Panel is formed, to the greatest extent possible the same persons should serve as panellists and the timetables of the proceedings should be harmonised;
c) A Panel which has been formed to consider a dispute between an investor and a Party to the MAI could be empowered to decide upon the request of another investor, which has a dispute with the Party raising common issues of law and fact, to join the proceedings as a party.

It could be considered whether other provisions for managing large numbers of cases would be desirable.

Parties could undertake to make best efforts to carry out Panel recommendations on interim relief.

A copy of a final decision will be delivered to the Parties Group and made publicly available by it, except to the extent that it has been determined by a Panel to contain confidential business information or personal data.

2.3 **Enforcement and failure to comply**

The Parties should carry out final and binding arbitral awards in good faith.

MAI Parties would provide for the judicial enforcement in their territories of any pecuniary awards.

In the event a Party fails to comply with an arbitral decision, the other Parties could co-operate with any specially affected Parties to bring about compliance:

*(a)* The Parties Group, by consensus minus the defaulting Party, might suspend the non-complying Party's right to participate in the Parties Group and its right to invoke the dispute settlement provisions of the MAI.

*(b)* If the failure to comply persists, any other Party might invoke the breach as grounds for suspension of the MAI dispute settlement provisions vis-à-vis the defaulting Party.

An exclusive list of countermeasures might be developed.

Recourse to countermeasures might be subject to procedural control by the Parties Group or a Panel.

Measures in response to a failure to comply could be subject to dispute settlement under the MAI, the right to which would not be subject to suspension or termination.
ACCESSION BY NON-OECD MEMBERS, INSTITUTIONAL ARRANGEMENTS AND IMPLEMENTATION OF THE AGREEMENT

Alastair Newton

1. Introduction

This paper draws on discussions in the MAI Negotiating Group at its April 1996 meeting as well as work done under the auspices of OECD’s Committee on International Investment and Multinational Enterprises (CIME) and Committee on Capital Movements and Invisible Transactions (CMIT) during the 1994-1995 programme of analytical work which led up to Ministerial approval of an MAI negotiating mandate in May 1995. It also takes account of views expressed by non-Members in various MAI-related outreach meetings over the past 18 months.

The MAI Negotiating Group will return to the subject matter of the paper later this year. Points raised in discussion at the Rio workshop will be fed into the negotiating process as appropriate.

2. Institutional Arrangements

2.1 Background

The origins of the MAI negotiations lie in the long-standing desire of OECD Members to strengthen the existing OECD investment instruments, notably by making the National Treatment Instrument (NTI) legally binding; in other words to give the NTI the same legal status as the OECD’s two Codes of Liberalisation (the Code of Liberalisation of Capital Movements and the Code of Liberalisation of Current Invisible Transactions). This work was launched in the early 1990s by the CIME and the CMIT and led to Ministerial approval of a negotiating mandate in May 1995.

That mandate charged OECD:

-- “[to negotiate] multilateral agreement on investment which would provide a broad multilateral framework for international investment...[and] be a free-standing international treaty open to all OECD Members and the European Communities, and to accession by non-OECD Member countries”;

-- “[to commence] immediately with the objective of reaching agreement by the time of the Ministerial meeting in 1997”;

-- “given the desirability of including non-Member countries in a MAI...[to consult] them as negotiations progress.”

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6 Vice-Chairman, OECD Committee on International Investment and Multinational Enterprises. Mr. Newton is also First Secretary at the United Kingdom Delegation to OECD.

7 The 1996 OECD Ministerial went even further, calling for an “intensified dialogue” with non-OECD Members.
2.2 **A Parties Group**

The annex to the report to Ministers seeking a mandate elaborated on the principle of “free-standing” as follows:

“The prevailing view is that the MAI would be a free-standing agreement with links (still to be defined) to the OECD. The OECD would be responsible for supporting the functioning of a “parties group” where OECD and non-OECD countries that become parties to the agreement would participate on an equal footing. The OECD Agreement on Normal Competitive Conditions in the Commercial Shipbuilding and Repair Industry[^8] provides some indications of the role that such a group could have.”

The Negotiating Group has yet to give this issue further consideration. It is reasonable to assume, however, that when the Negotiating Group does so later this year it will confirm the principles in the 1995 Report to Ministers and move quickly on to considering the more detailed aspects of how the Parties Group would be established and run.

2.3 **Other OECD Instruments**

The Negotiating Group will also address later in the year the question of the relationship between the MAI and the other OECD instruments. There will be political choices to be made as well as technical/legal questions to address.

For the OECD Codes of Liberalisation the assumption of the CIME/CMIT was that the MAI would cover (as a minimum) obligations on investment in the establishment and post-establishment phase, all associated capital flows, and the free transfer of income from capital (including interest, profits, dividends and rents). However, it is likely that some elements of the Codes (which are, as previously noted, legally binding on OECD Members) will remain outside the MAI and would not therefore be binding upon MAI Parties which were not also Parties to the Codes.

Similarly, the question of what happens to the different elements of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises (of which the NTI is just one instrument) depends on what is ultimately included in the MAI. Certain elements, for example the OECD Guidelines for Multinational Enterprises, could be incorporated as separate annexes, with references in the preamble to the MAI. This leaves open for further consideration by the Negotiating Group the question of the status of the relevant OECD Council decisions on procedural matters and whether and how to associate non-Members with these decisions.

2.4 **Other Non-OECD International Agreements**

It is a widely accepted principle that the MAI should avoid conflicting requirements with other international agreements and allow better treatment for the investor to prevail. The degree of overlap, however -- and, therefore, any potential conflict -- can only finally be determined once the MAI obligations have been defined. The relationship between the MAI and taxation agreements and WTO instruments (GATS, TRIMS, TRIPS) merits special attention and is a high priority for the Negotiating Group.

[^8]: Korea, which is a non-OECD member, is a party to the Shipbuilding Agreement.
3. Accession of Non-OECD Members and Implementation of the Agreement

3.1 Basic Assumptions

Since the MAI is being negotiated as a free-standing agreement, any consideration of the mechanisms by which non-OECD Members could accede to it must start from the assumption that there should be no substantive difference between the accession procedures and conditions for OECD Members and those for non-Members.\(^9\)

There are both political and substantive reasons underpinning this. Politically, it is already clear from discussions with non-Members that an identical accession process for Members and non-Members is an absolute condition if non-Members are to be willing to sign up to an instrument which has been negotiated without their participation. Substantively, there is no reason why the accession “rules” for non-Members should differ from those for Members.

It follows from this that non-Members should negotiate the precise terms of their accession to the MAI (i.e. their reservations) in essentially the same way as OECD Members.\(^10\)

This is a key factor in encouraging non-OECD Members to adhere to the MAI since it is this element of negotiation which underpins flexibility on the terms of adherence comparable to that available to OECD Members.

It follows, in turn, that any consideration of the accession procedure for non-Members must start by looking at what is envisaged for OECD Members.

3.2 Accession of OECD Members

At the January 1996 Negotiating Group meeting it was anticipated that the Negotiating Group would conclude the negotiation of a framework agreement by the end of 1996 and that the period between then and the 1997 Ministerial would be taken up by Negotiating Group participants negotiating the terms of their accession to the MAI, i.e. their reservations. The intention is to conclude that process by the time of the 1997 OECD Ministerial in order to present Ministers with a “package” comprising the Agreement itself and full lists of proposed country reservations for OECD Members.\(^11\)

3.3 Implementation of the MAI - The Uruguay Round Model

Assuming that this “package” is approved by Ministers, the next stage, since the MAI is to be a treaty, would be a ratification period. The Negotiating Group has identified a number of other relevant agreements to

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\(^9\) There will inevitably be one significant difference in the accession procedures between those countries which go through the process before the 1997 Ministerial and those which do so after. The former will have the opportunity to influence the reservations of other aspiring Parties, where the latter will not (except for those who come into the adherence pipeline after they themselves have become Parties).

\(^10\) Depending on the timing of their accession bid non-members would negotiate with either the Interim Group during the ratification period, or with the Parties Group once the Agreement comes into effect.

\(^11\) Based on the Uruguay Round model it would not be open to OECD members to negotiate further reservations between the 1997 Ministerial and the time when the MAI comes into force.
see what lessons can be drawn, i.e. the Helsinki Accord on Export Credits, the Energy Charter Treaty, the OECD Shipbuilding Agreement, bilateral Investment Promotion and Protection Agreements (IPPAs) and the WTO. Of these, the most relevant to the MAI may be the Uruguay Round Agreement.

The Uruguay Round was agreed on 15 December 1993, i.e. market access offers were unconditional and the texts of the agreements were declared final. There followed then a three month period in which final tariff schedules were deposited, “verified”, and sorted by the GATT Secretariat into a legal form. The final package was approved by Ministers at the Marrakesh Conference in April 1994.

Parties to the agreement were then invited to complete their domestic ratification procedures so that the WTO agreement would come into force on 1 January 1995. In the meantime a Preparatory Committee was set up to ensure that the necessary decisions were taken to enable the WTO to be operational at the date of entry into force.

Once domestic procedures were completed Parties had to deposit a formal ratification instrument with the GATT Secretariat. It was not possible to make ratification conditional or to take reservations. An Implementation Conference was held in December 1994 to review the state of play on ratifications. This confirmed entry into force on 1 January 1995.

Drawing on the Uruguay Round model suggests the following possible approach to the implementation of the MAI:

(a) that in approving the package presented to the 1997 OECD Ministerial, Ministers would agree on a ratification period after which the MAI would come into force;12;

(b) that Parties would be required to deposit formal instruments of their ratification13 by the end of that period;

(c) that the Negotiating Group would be stood down at the 1997 Ministerial and an Interim Group (IG), which would open to all OECD Member countries and the European Communities, established during the ratification period to oversee the process and to conduct other relevant business (see paragraph 21 below); and,

(d) that the Parties Group would come into existence immediately after the ratification period had been concluded and would comprise all those which had ratified the MAI (at which time the Interim Group would be stood down).

3.4 Timing of Non-member Accession Negotiations

The emerging consensus at the April 1996 meeting of the Negotiating Group was that the door to non-Member accession must be opened as early as possible after work on the MAI framework has been successfully

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12 This period should be kept as short as reasonably possible, e.g. the MAI to come into force no later than 1 January 1998.

13 Especially if the MAI Parties Group is to be serviced by a unit based at OECD (as is the Helsinki Accord and the Shipbuilding Agreement), it would make sense for instruments of ratification to be deposited with the Government of the French Republic.
concluded. To this end a group should be set up in 1997 to conduct accession negotiations with those non-
Members willing and able to take on the obligations of the MAI (see below). If an Interim Group were
established on the lines proposed above this is one of the tasks with which it could be charged. Non-Member
accession could therefore be taken forward during the ratification period, thereby opening up the possibility of
non-Members being Parties to the MAI from the moment it comes into force.

3.5 Criteria for Non-OECD Member Accession once the MAI is in Force -- General Principles

As for the eligibility of non-OECD Members to accede to the MAI once the Agreement has come into
force, during the 1994/95 CIME/CMIT programme of analytical work there appeared to be consensus on four
points, which were subsequently confirmed either explicitly or implicitly in the 1995 negotiating mandate, as
follows:

- accession would be subject to agreement by all existing Parties to the instrument;
- it would be entirely independent to OECD membership;
- it would be open to non-members willing and able to take on its obligations; and,
- some sort of examination by the Parties, probably similar in essence to OECD examinations under
  the Codes/NTI and/or the WTO accession process, would be required to assess how aspiring
  Parties measured up relative to those obligations and to allow aspiring Parties to negotiate the
  precise terms of their adherence (although accession to the MAI would, clearly, not then be subject
to approval by the OECD Council).

Assuming that all Parties would be required to accept all the general obligations of the MAI and that
accession negotiations would therefore focus primarily on proposed reservations, a number of questions relative
to the key matter of "taking on its obligations" require further consideration. Various possible approaches were
identified during the 1994/95 programme of analytical work and will be considered further by the Negotiating
Group later this year.

The key issues which emerge are the (related) ones of:

- whether there would be “core” conditions for non-Member accessions; and,
- whether there would be some sort of “benchmark” (de facto or otherwise) defining (quantitatively
  and qualitatively) the acceptable limit of reservations and therefore the minimum requirement for
  accession beyond the “core” conditions,
- the three main lines of thinking which can be drawn from the work to date are: that “core”
  conditions for accession to MAI will emerge towards the end of the negotiating mandate as
  participants in the NG determine the terms of their own adherence;
- that in practice there will then almost certainly be at least a de facto “benchmark” beyond that,
  albeit one which may not be precisely defined but which would be no lower than the lowest overall
  standard of liberalisation set by an existing Party; and,
- that some sort of transition period might be envisaged for non-OECD Members adhering to the
  MAI by which additional time-limited reservations would allow accession at a level of overall
  liberalisation below the established “benchmark”.

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14 Although this section of the paper have been written primarily with an eye to non-OECD Member
accessions after MAI comes into force the questions raised in it would apply equally if an IG were established and
charged with negotiating non-Member accessions in the period immediately after the 1997 Ministerial.

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