

**MULTILATERAL AGREEMENT ON INVESTMENT  
PROGRESS REPORT BY THE MAI NEGOTIATING GROUP**

**ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT**

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## SUMMARY

In May 1995, OECD Ministers agreed to negotiate a multilateral agreement on investment (MAI) open to all OECD Members and the European Communities, and to accession by non-OECD Member countries. The agreement would build on experience with the existing OECD investment instruments, consolidate the results achieved, and create new disciplines in order to provide a comprehensive framework for international investment. It would set high standards for investment liberalisation and investment protection and contain dispute settlement procedures. A Negotiating Group<sup>1</sup> has been working towards the objective of reaching an agreement by Spring 1997 for submission to the OECD Council at Ministerial level.

Overall, the negotiations are on course. Most substantive issues have been examined and a framework for the MAI is evolving. Rapid progress was made in the area of investment protection. There is broad agreement that the MAI will provide comprehensive coverage through a broad definition of investors and investments. Key provisions on national treatment, MFN, and transparency are well advanced and are based on an ambitious "top down" approach. Possible mechanisms for standstill and rollback and for the listing of country specific reservations have been identified as have the components of a dispute settlement mechanism, both state-state and investor-state.

However, much remains to be done. In areas where texts have been developed, some outstanding issues remain. Discussions on the definition of investment and how it will be applied, need to be finalised. How to realise the aims of the negotiations still must be determined in some cases: achievement of a high level of liberalisation; application of disciplines to areas of liberalisation not satisfactorily covered by the present OECD instruments; application of these commitments to all parties to the MAI at all levels of government; dealing with measures taken in the context of regional economic integration organisations. Consultations with non-Member countries need to be intensified.

Some difficult choices remain. Certain issues might only be resolved in the final phase of the negotiation, but work should progress to identify possible solutions. The next phases of the negotiations will require a spirit of creative compromise to ensure the full achievement of the objectives set by Ministers last May. Maintaining the present momentum will be decisive in achieving an agreement by the 1997 Ministerial.

Ministers are invited to:

- welcome the progress made so far in the negotiation of a Multilateral Agreement on Investment (MAI);
- reaffirm their determination to reach an agreement by the Ministerial meeting in 1997, with high standards of investment liberalisation and protection and effective dispute settlement procedures, and to aim at achieving a higher level of liberalisation; and
- underline the importance of engaging in an intensified dialogue with non-Member countries, in particular with those interested in acceding to the MAI.

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<sup>1</sup> Chaired by Mr. Frans Engering (Netherlands); Mr. Alan P. Larson (United States) and Mr. Akitaka Saiki (Japan) are vice-chairmen.

## **Results So Far**

The Negotiating Group began negotiations in September 1995. All OECD Member countries and the Commission of the European Communities take part in the negotiations. The WTO is a permanent observer in the Negotiating Group and on occasion participates in technical discussions at expert group level. The IMF and ICSID (International Centre for the Settlement of Investment Disputes) have also attended meetings of the drafting or expert groups as observers.

The following paragraphs provide a brief description of the topics which have been examined so far.

### *a) definitions and scope of the MAI*

The aim is to provide comprehensive coverage through a broad definition of investors and investments even if there are some limits in how the definition would apply to certain MAI obligations. This definition, as well as the formulation of an article on the geographical scope of the agreement, need further discussion.

### *b) the treatment of investors and investments*

Texts have been submitted on national treatment, non-discrimination/MFN and transparency obligations which are designed to apply to both pre- and post-establishment. The issue of non discriminatory barriers has also been considered. Mechanisms have been identified to achieve standstill and rollback and to list country specific reservations; these mechanisms are essential to liberalisation. General exceptions to the basic obligations of the agreement, including national security, public order, and international peace and security, are under consideration, as is the need to provide for a temporary derogation based on balance of payments difficulties.

### *c) special topics*

Going beyond existing liberalisation commitments means breaking new ground in areas not covered, or only partially covered, by other international agreements bearing on investment matters. Examples exist for dealing with issues such as key personnel, performance requirements, and monopolies and state enterprises. More innovative would be any MAI disciplines on privatisation, investment incentives, and corporate practices. Further work still remains to be done in all these areas.

### *d) investment protection*

A text incorporating high standards of investment protection was sent forward to the Negotiating Group in December 1995. This includes provisions on the general standard of treatment, compensation in the event of expropriation, protection from strife, free transfer of funds and subrogation.

### *e) state-state and investor-state dispute settlement*

Most investment disputes that might arise under the MAI should be settled in an amicable manner and procedures to encourage amicable solutions would be an important feature of the MAI's dispute settlement mechanism. However, binding state-state and investor-state arbitration would be available to ensure effective recourse in the event of breach of the agreement.

### *f) the treatment of taxation issues under the MAI*

How to deal with the interface between MAI obligations and tax policy concerns is currently being addressed.

*g) Accession by non-Members*

The MAI will be a free standing international treaty, open to accession by non-Members countries. Accession procedures for the MAI and what actions could be taken to facilitate non-Member accession are being considered.

The Negotiating Group is engaged in an active programme of seminars and informal consultations to provide information on the negotiations and to hear the views of non-Members. Consultations are carried out through a wide range of mechanisms, including the "policy dialogue workshops" with the dynamic non-OECD economies of Asia and Latin America, and the Emerging Market Economy Forum launched this April. Most of the countries of Central and Eastern Europe and the former Soviet Union are also informed through the OECD Advisory Group on Investment. The Russian Federation is briefed through the special Expert Group on Investment. A meeting with Latin American countries will take place in Rio de Janeiro in July.

**Future Work**

The Negotiating Group will, within the next year, intensify its consultations with non Member countries, in particular with those interested in acceding to the MAI.

The Negotiating Group will also start work on the issues arising from the integration of the different elements identified so far. The Negotiating Group needs to complete the work on taxation measures and on special topics. There will be a discussion on extraterritoriality issues, such as conflicting requirements that investors or investments may face when operating in more than one state, and on secondary investment boycotts. Key questions concerning the scope of dispute settlement procedures, the application of the agreement to all Parties to the MAI at all levels of government and the treatment of measures taken in the context of REIOs have to be worked out.

The Negotiating Group must also address a number of important issues relating to the institutional framework for implementing the MAI, including the role of a "Parties Group" and the relationship with existing OECD instruments -- the Codes of Liberalisation and the 1976 Declaration and Decisions on International Investment and Multinational Enterprises.

In its discussion of issues relating to investment in services, intellectual property, investment incentives, and dispute settlement, the Group has been sensitive to concerns of potential overlap with other international agreements such as TRIPS, TRIMS, and the WTO/GATS. The Group will examine the issue of overall relationship between the MAI and other international agreements, including bilateral investment protection treaties, when MAI obligations have been decided.