

MULTILATERAL AGREEMENT ON INVESTMENT

STATE OF PLAY IN APRIL 1997

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Paris

53458

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FOREWORD

The following is a selection of papers presented at the Symposium on the Multilateral Agreement on Investment, held in Seoul, Korea, on 3-4 April 1997. The Symposium was organised by the OECD and the Korea Institute for International Economic Policy.

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OPENING ADDRESS

Mr. Kyong-Shik Kang
Deputy Prime Minister and
Minister of Finance and Economy, Korea

Chairman of the MAI Negotiating Group Mr. Engering, Distinguished Guests, Ladies and Gentlemen:

Let me begin by thanking the OECD and the Korea Institute for International Economic Policy for their joint hosting of this Symposium. Their excellent preparations and efforts have enabled many distinguished guests to gather here today. Indeed, I am privileged to stand before an audience of individuals who possess backgrounds, capabilities, and interests that will help them leave a large impact on the future course of the world economy.

In keeping with the focus of this Symposium, I would like to present some thoughts on international investment. As many of you know, international investment is rapidly becoming an important force in the world economy. Along others, it stimulates economic growth; it creates jobs; and it promotes technology development.

The importance of international investment has been recognised by many countries. This recognition has motivated them to actively seek foreign direct investment. Combined with other factors, the pro-FDI stances of many countries have helped produce impressive results. For example, the total foreign direct investment inflows for all countries increased from US\$ 158 billion in 1991 to US\$ 315 billion in 1995. In addition, the total foreign direct investment inflows to developing countries grew from US\$ 41 billion in 1991 to US\$ 100 billion in 1995.

Now, I would like to briefly mention Korea's experience. Since the 1960s, Korea has maintained strong economic growth, with its real GNP growing at an annual average of over 8 per cent. Moreover, by 1996, Korea became the 12th largest trading nation in the world.

The economic success of Korea can be partly explained by its commitment to an outward-oriented development strategy. In the area of international investment, this commitment has taken the form of continued liberalisation of foreign direct investment. In addition, Korea has become an increasingly active participant in international organisations, especially with its recent joining of the OECD.

Shifting our attention to the global stage, increasing international investment has induced various responses. Main examples include bilateral and regional agreements on investment. These arrangements represent efforts by countries to keep in pace with developments in the world economy. A key development, which I am sure all of you know well, has been the phenomenon of the multinational or transnational enterprises. According to many research findings, intra-company transactions within these

extremely large enterprises constitute a large portion of world trade flows, and their revenues are larger than the GDPs of many nations. And, these multinational corporations are the main actors who implement international investments.

To deal with the trend of globalisation, the need has grown for a multilateral regime which offers a uniform, stable, and predictable environment in which these enterprises can conduct their activities. Also, in light of the close relationship between trade and investment, a strong argument can be made for a multilateral regime in the context of international investment to parallel the WTO regime governing international trade.

In this regard, I would like to commend highly the efforts of the OECD to construct a state-of-the-art, multilateral framework for investment protection and liberalisation, namely the Multilateral Agreement on Investment.

I am aware that there are diverse views and approaches on some issues in the on-going MAI negotiations. As an optimist, however, I hope that the participants will be able to reconcile whatever differences there may be. The wish I have, which I am sure you share, is that the MAI will become a model framework for participating countries as well as an exemplary guide for investment liberalisation. Furthermore, I would like to see the MAI succeed in finding a balance between liberalisation of investment and continuation of stable economic growth.

In this regard, I believe symposiums like our present gathering today are very important, because they provide an excellent opportunity for bringing together different interests and goals in an open forum. Indeed, a main purpose of this conference is for the non-OECD countries to share experiences and views so that their concerns may be reflected in the MAI. By doing so, the MAI can become a truly global regime, and thus enjoy great success.

In closing, I would like to thank all of the participants for their valuable contributions of time and talents. I am confident that such contributions will help make this Symposium a success. And to those of you who have made a long trip to Korea, I wish you all an enjoyable stay in Seoul.

Thank you very much.

KEYNOTE ADDRESS

Frans Engering¹

Ladies and Gentlemen, Good morning. I'm very grateful to have been invited to come to Seoul. It's not my first time in Seoul, but it's the first time I have come to Seoul to speak about the MAI. It's an important subject and I'm very happy that you also accepted, as I did, the invitation to come here to exchange views on the MAI negotiations. About 12 twelve countries from Asia and the Middle East have accepted the invitation to send senior policy makers in the field of investment and we in the OECD are grateful for this occasion to exchange views. We want tell you what we are doing and we want to listen to you and to your comments.

Let me say a few things about the MAI negotiations -- why there should be rules in the field of international investments; the nature and structure of the MAI and; finally, where we stand in the negotiations.

First of all, you may remember that in May 1995, OECD Ministers concluded that the time had come to start the negotiations on a multilateral agreement on investment. I know, by the way, that our good friend Mr. Renato Ruggiero from the WTO prefers to speak about a plurilateral agreement on investment because the only real multilateral field is Geneva, and he has a point there. For the time being we are not really talking about a world-wide organisation, although when the time is right, we should talk about international investments on a world-wide scale.

For the time being, we are discussing this important issue among 29 countries - we started with 25 two years ago, but we are 29 countries now, plus the European Commission in its own right, representing the European Union. So we are 30 negotiators, and that, indeed, is not yet world-wide. We started in September 1995, and have made enormous progress. One and a half years for such a complex and unique negotiation is very short. We are supposed to report to the OECD Ministers at the end of May. The ambitions of the OECD Ministers were very high, both as concerns the quality of the agreement and the timing. So , we are now practically at the end of our mandate.

Why rules? Why is it so important to develop rules? Some countries indeed have the feeling that things are going well. They receive a lot of foreign investment and sometimes there is concern that there is too much rather than too little. I remember reading once in the newspaper that the Indian Prime Minister said that India was the biggest democracy in the world and yet it did not receive enough investment, and wondered what was wrong. I don't know what is wrong, but I can tell you that rules can help. A number of countries feel that they have to struggle with too many inflows of foreign investment and maybe that is true at the moment, but things can change. Indeed there are a number of interesting calculations by international organisations indicating that in a couple of years, enormous amounts of

¹ Mr. Engering is the Director-General of Foreign Economic Relations of the Netherlands, and Chairman of the Negotiating Group on the MAI.

money and flows of funds involved in the infrastructure of especially Asian countries, will be so high that there will be fierce competition for inflows of foreign money. Today's Korean Herald states on the front page "The region is estimated by multilateral agencies, such as the World Bank, to require 1500 billion dollars, 1.5 trillion dollars, in investment for growth requirements such as power, telecommunications and airports over the next decade". Those who are satisfied, at the moment, with the inflow of funds may have to think whether that will remain the case in the coming years. Even if foreign flows are coming in, countries which do not participate in international rules or agreements may be charged higher risk premiums. In addition, capital importing countries are becoming more and more capital exporting countries, in their own region but also abroad. The Asian countries have started to invest not only in Japan but also in the United States and more and more also in Europe. So they can benefit from international rule making both as capital importers and capital exporters.

In fact, this process of rule making in international investment is not fundamentally different from rule making in the field of international trade. We started with bilateral trade agreements between the First and Second World War but these were not strong enough to brave the tides at that time, and finally the whole process collapsed. Multilateralism in the area of trade in particular, began after the Second World War, under the leadership of the United States. You may recall that the Havana Charter already addressed investments, but not yet international investments. Now, after a period of bilateral investment treaties -- there are more than one thousand of them -- we have come to the stage where we start to talk of multilateralising them.

In a bilateral negotiation, the outcome is always different from another outcome, so there is an enormous uncertainty in the end game. What we should do is to bring them together under one roof, make them one multilateral system. The Uruguay Round of the WTO and the GATT, already touch on foreign investments. We have elements of foreign investment rules in GATS, also in TRIMs and TRIPs, but they are only partial. The NAFTA has articles about investment but only three countries are members of NAFTA. The Energy Charter Treaty addresses investment in the energy sector. There are also the OECD instruments which have had an important on foreign investment. However, in light of the enormous flow of international investment today, a more comprehensive approach is needed.

I would be interested in the views of the countries here, whether they have the same feeling that multilateral rules in the field of foreign direct investment are required.

Now about the nature of the MAI. You read things in the press that lead you to conclude that not everyone understands what the MAI is about. MAI is about non-discrimination and liberalisation; but there is so much more in the world that is not covered by the MAI. Sometimes you read that the MAI will take away national sovereignty. That of course is not the case. We don't think the MAI, important in itself, can do that. A country that signs up to the MAI will, of course, remain totally responsible for its policies. If it has a policy, for example, with high environmental standards, it can maintain these policies. The only requirement is that these be applied on a non-discriminatory basis, i.e. the same rules should apply to both domestic and foreign companies.

In addition to non-discrimination, the MAI contains another important element - liberalisation . We ask countries that sign up to the MAI that they open up, in principal, their markets; if domestic investors are allowed to invest in a sector, foreign investors should also be allowed to invest in that sector.

That is what the MAI is about and you will probably say if that is all, what have you been talking about for so long in Paris. It is, in fact, a complicated and ambitious project. I like to compare the structure of the MAI to that of a building. We have a definition of investor and investment and this is our foundation. Then we have the obligations we undertake as Contracting Parties. These are the walls of the

building. The roof is the dispute settlement system. You may have a very broad definition and significant obligations but without a dispute settlement system, the whole agreement is a paper tiger. On the other hand, if you have strong obligations and an effective dispute settlement system, but a narrow definition of investment, the many diverse ways that foreign companies carry out international investment may not be covered. So what we have been striving to achieve is a comprehensive agreement with a broad definition, strong obligations of governments and an effective dispute settlement system. That's easily said but not easily done.

The negotiations raise a complex set of issues. We must focus on making further progress on the core text of the agreement. That is the first and foremost problem that we have to solve. The second is that we have to deal with country specific reservations. The third point is that we need to find solutions to a number of policy level issues. These are sensitive problems that have to be addressed in the text of the agreement or through country specific reservations or we must find other ways to deal with them. The fourth point, and not the least, is the outreach policy. The MAI is meant to be a free-standing agreement and it is, in my opinion, meant to be an agreement between OECD and non-OECD countries that are willing to participate.

Let me talk about the text of the agreement. As I said, it is a building with three elements:

The definition: In fact we started this discussion very early in the negotiations -- September 1995. Normally you end up at the very last meeting with a definition. We are more ambitious than that and we already have a definition -- which we use as our working hypothesis since January 1997. This is the first building block and everything is related to that. The definition is a very broad asset-based broad definition. Every asset owned or controlled by an MAI investor relating to an investment is, in principle, covered by the definition. Of course this covers tangible investments but also a number of intangible investments, including intellectual property, although elements of that are still under debate. We talk about financial flows; even about government debt. These kinds of things are in principle included in the definition, but of course we must provide adequate safeguards so that obligations in this area do not contradict other investment policies, such as monetary or exchange rate policies.

Given that broad definition, we now need to look at the obligations we have agreed to. In principle, of course, we talk about national treatment. That is the most central element of non-discrimination: a foreign company should be accorded the same rights and obligations as a domestic company. Non-discrimination also means the most favoured nation (MFN) principle. We are familiar with this concept from our international trade negotiations. Here it is applicable as well. But by extending these familiar principles to new fields, we are breaking new ground. Here we are talking about a new set of topics, to further cover the risks of foreign investors, including the possibility for foreign companies to bring with them some key personnel. That's important for investors. We are looking at other issues affecting foreign investors, such as investment incentives and performance requirements. Privatisation and demonopolisation are sovereign decisions by governments, but if a country so decides, can it be done on a non-discriminatory basis? Here, there is not much guidance from other agreements.

Then we go on to the dispute settlement system, where we intend to have both state-to-state, as, for example in the WTO, and investor-to-state dispute settlement. That is logical and understandable but it is very complicated. We have worked out many detailed provisions which we have incorporated in a text on dispute settlement, but there are a number of important issues still to be resolved.

This is, in very general terms, the substance of the agreement. Let me say a few words about reservations. In January, we asked the negotiating countries and the EC to submit country specific reservations. When they sign up to the agreement, they commit themselves to all the MAI obligations, but

if national legislation or other international obligations do not allow them to comply with all the obligations, they have to take reservations. We currently have on the table the lists of reservations submitted by countries. We see that a number of countries still have to take reservations on a number of issues. We have not yet started in-depth negotiations on the lists of reservations and we want to encourage a process of give and take -- if I ask you to bring down the number of reservations, what can I do for you? Some countries have submitted only few reservations. Others for the moment, may have taken -- perhaps as a matter of precaution, slightly more reservations than were necessary. In the end, of course, we must have a satisfactory balance of obligations. "Give and take" negotiations are familiar tools in trade negotiations. But the conceptual questions that have to be solved here, are much more complicated than in the trade negotiations. The question is what are the reservations about? Are we talking about a status quo, i.e. a standstill on the introduction of new measures? What do we mean by standstill if new obligations are covered by the MAI? I will not dwell here on a number of other technical questions because there will be ample opportunity to do so, but we have discovered that the negotiations on reservations may require more time.

There are a number of political issues which reflect policy debates at home and which we bring to the negotiating table. For example, we need to address the problem of extraterritoriality. Some countries have traditionally set up rules and laws for themselves and applied them extraterritorially. That is not acceptable for a number of other countries. And if it is not sorted out here, then it is difficult to come to final conclusions on the MAI. In other countries, cultural policies raise sensitive issues. We also have to find solutions for that in the MAI. Some countries want a carve-out for culture. That seems to be too sweeping a solution to the problem. We may need to look for more measured solutions.

We have the interesting problem of measures taken in the context of a REIO (regional economic integration organisation). Fifteen countries of the European Union claim that they are a REIO but there is no definition of a REIO. If a REIO exists, then apparently the European Union is one. We have an economic internal market for trade and investment; there are hardly any restrictions for companies from one country in the European Union to another country and vice versa. There is the request by the European countries to be treated in the MAI as a REIO, which would allow them to keep some things among themselves which would not be automatically available for other Parties, in principle, however, we keep our rules that everything is done on an MFN basis.

The binding of sub-federal levels of government is another example of a political issue. We have a number of federal states in the negotiations - the United States, Canada and Australia but also Mexico, Switzerland, Germany, Belgium, Austria and so on. They are all, in principal, federal states, and the question is, if they sign up to the treaty, do they bind only their federal government or do they bind their whole economy, including sub-federal entities, states or provinces or cantons? Are they covered - yes or no? We need to know because we are talking about achieving a balance of commitments; a signature that does not bind all levels of government is not interesting for the other negotiators. For some countries, constitutional issues may be involved but we hope that at the end of the negotiations, a signature of the MAI will mean that the whole economy is covered.

Taxation is another very sensitive but important issue. No treaty on foreign investment is credible if nothing is said about taxation. The first thing a foreign investor inquires about and analyses is a country's tax system: what kind of rules exist and what kind of rules he must adhere to. A treaty on foreign investment which is silent on taxation is a strange animal. On the other hand, we know that there is a vast network of bilateral tax treaties, with their own traditions and rules. It is not the intention of the MAI to undermine these. It is quite clear that taxation is not yet developed to such a stage where we can talk about multilateralisation. We started with trade, we are talking about investment today and perhaps in the future we can also talk about the multilateralisation of taxation agreements. That is, however, far away

and we have to accept that there is a bilateral world in the taxation field and a multilateral world in the field of investment. How to connect the two? That is a very complicated question. Both sides are right if they say that this is difficult but on the other hand we cannot do without a discussion on taxation. We have not yet come to a conclusion but we see that a number of taxation elements should be left out of the treaty and, at the same time, a number of elements should be brought into the treaty.

There are a number of other issues being raised in connection with the MAI, for example environment and labour standards. This has happened in trade negotiations; we talk about trade and the environment, trade and labour standards. There were discussions in the WTO in Singapore. We all know the outcome of that and we are also confronted with the question whether it is possible to connect investment agreements and obligations with environment and labour standards. We are trying to find an answer. The MAI is about non-discrimination and if a country has an environment policy, then of course a foreign company must comply with this. The question is whether you need special environmental and labour standard rules. We will need to address this in our agreement but in a non-binding fashion. Maybe we can associate the OECD Guidelines on Multinational Enterprises that contain recommendations by governments to multinational companies operating in their territories and annex them to the agreement. Perhaps we can find solutions acceptable to all interested parties.

Let me turn here to outreach policy. This is one of the most important things for me personally. From the very beginning, in parallel with the negotiations in Paris, we started talking about the MAI to the outside world. I believe that the MAI can only be a political success if non-OECD countries can participate from the very beginning. So we started informing them in a number of ways. One of them is the OECD seminars -- two months ago we had an interesting seminar in Latin America, in Brasilia. Last year there was one seminar in Hong Kong and next month there will be one in Eastern Europe. So we at the OECD do a number of things. But that is mostly about providing information and opportunity for discussion; it is not yet participation. We have also organised discussions with the embassies of non-OECD countries in the capitals of a number of MAI negotiators. I myself did that in my capital and I know that a number of OECD colleagues have also done so.

The question arises, however, whether that is enough. Many countries are interested in knowing as much as possible about the negotiations. Some are curious and what to know about it, and they are welcome and others that think it would be useful for them to participate, maybe even from the very beginning, and they are very welcome. I think that we should react to these different interests in a measured way. Those who might be willing to consider participating in the MAI need a more intensified dialogue than those who just desire information. I would be interested to discuss this with you. If countries really think that they want to participate, OECD countries would be very happy to engage in more discussion and dialogue, and exchange views with non-OECD countries but we are considering how best to do that, now that this initial phase of information sharing will be coming to an end. I would invite your suggestions on this matter.

The last point I want to discuss is the timing of the MAI negotiations. That is very important because our expectation was that we would have a final text of an agreement to OECD Ministers at the end of May. We have indeed worked very hard and, in my opinion, we have made significant progress. We have put a lot of effort into developing a truly innovative agreement. This unique result is, I think, the successful outcome of the negotiations so far. At the same time we have come to the conclusion that apart from technical issues where solutions are close at hand, we still must resolve a number of political issues as well as the question of country reservations. We will ask our Ministers, when we present them with our results in May, whether they agree to extend our mandate for negotiation. I don't think that we need very much more time, just a bit more, but it is for the Ministers to decide how much time they will give us.

Rather than extending our mandate, we could have chosen instead to settle for lower standards and then finish off by May this year. We discussed this and decided that it would be a pity. We are so close to a unique high-standard agreement - let's go for it. It's better to have a high quality agreement a bit later than to have an agreement without high standards, on time. We believe the Ministers should allow us a few more months to conclude a high standard agreement. We will present a report to Ministers in May, and we will make continue to make progress between now and then. With hindsight, perhaps we were too ambitious to think that such a unique agreement could be negotiated within two years. History will not judge us very severely if we take a few more months.

This is what I have to say as an introduction to the discussions here. I hope that we as the OECD partners and negotiators of the MAI agreement will learn from your comments and suggestions, and I am personally very interested, especially in the field of outreach policy.

Thank you.

OPENING ADDRESS

William H. Witherell¹

Minister Kang, distinguished officials, ladies and gentlemen,

As we begin this important event, I would like to express the OECD's appreciation to the Government of Korea for its generosity as host of this Symposium on the Multilateral Agreement on Investment (the MAI). I would also like to thank the Korean Institute for International Economic Policy for co-sponsoring this event.

I am pleased to welcome the many senior investment policy officials from Asia, the Middle East, and OECD Member countries, and from international organisations. Your presence here underscores the value we all attach to an international framework providing high standards for the protection and liberalisation of foreign investment.

It is not the first time that we come together to discuss multilateral investment rules and foreign direct investment. Many of you will have taken part in the Workshops in Wellington in April 1995, and Hong Kong, in March 1996, organised in the context of the OECD's Policy Dialogue with Dynamic Non-Member Economies. Reports and discussion on the current status of MAI negotiations were provided on both those occasions. Information on the MAI has also been made available through regular briefings with non-Members held, back-to-back, with the MAI Negotiating Group meetings.

This Symposium takes place at a time when the main components of the MAI are in place. Since February, OECD countries have begun examining the lists of country specific reservations which, in addition to the framework rules, will determine the degree of liberalisation achieved by the MAI. Much has been accomplished, but considerable work remains to be done. In my opinion, this is a good time to engage in an in-depth consideration of the key issues of the MAI.

In the remarks that follow, I would like to first place these negotiations in the context of recent trends and then to provide a short overview of the major features of the MAI, and some observations on the likely benefits from participation in the Agreement.

I. Foreign Direct Investment of Increasing Importance

The great attention now being given to foreign direct investment is not surprising in view of the critical role played by FDI as one of the primary vehicles for international economic integration. A large and growing number of firms now view overseas expansion through direct investment as a necessity rather

¹ Mr. Witherell is Director for Financial, Fiscal and Enterprise Affairs in the Organisation for Economic Co-operation and Development

than as a luxury reserved only for the largest firms. This growing awareness of the need to invest abroad is matched by a keen competition among host countries to attract firms. While there remains ample scope for further liberalisation in many countries, the charges which have arisen so far represent a watershed in attitudes towards the participation of foreign-owned firms within the domestic economy. Accordingly, in recent years foreign direct investment has been growing rapidly, faster, indeed, than international trade. In 1995, the last year for which we have fairly complete data, world FDI flows increased by some 40 per cent to \$315 billion. Firms based in OECD countries accounted for some 90 per cent of global direct outflows in 1995. OECD's share of global inflows was somewhat less, about 65 per cent.

Looking at cumulative inflows of foreign direct investment over a six year period, 1990-1995, we see that the OECD Member countries plus the Asian countries which are not OECD Members together accounted for fully 86% of global FDI inflows in the 1990's. If we look at the forty largest host countries for foreign investment during this period (see attached table) we find that fully 34 of the top 40 are Members of the OECD or APEC or both. The remaining six are three oil-rich states (Saudi Arabia, Nigeria, and Venezuela) and three dynamic Latin American economies (Brazil, Argentina and Columbia). These data show China, at number 3, as the highest ranking Asian non-OECD host country and 1996 data may well show China moving further up. Many of these non-OECD countries also are becoming significant sources of outward investment. In short, the countries participating in this symposium represent most of the world's major host and home countries for foreign direct investment.

II. What will the MAI look like?

The MAI will be the first multilateral agreement to combine disciplines in three key areas of foreign direct investment rule-making: specifically, investment protection, investment liberalisation and dispute settlement. The negotiations have made good progress in all three areas and the prospects are good for achieving a high standards agreement.

Based on the progress to date, one can say the following:

- the coverage of investment will be broad, going well beyond traditional notions of foreign direct investment to include portfolio investments and intangible investments: in short, essentially all of the assets of an investor.
- the investment protection provisions will be very similar to those found in the best bilateral agreements (BITs), including such provisions as fair and equitable treatment, free transfer abroad of profits and dividends and compensation in the event of expropriation;
- the non-discrimination principles of national treatment and MFN will be assured for the establishment of new investments by non-resident investors and for the operation and expansion of established investments under foreign control -- these provisions will provide market access and "a level playing field";
- the dispute settlement procedures will include both state-to-state and investor-to-state arbitration.

We are also developing new liberalisation disciplines to give several examples, there will be provisions providing effective market access for foreign investors in the area of privatisation. A provision on the movement of key personnel will ease the transborder movement of human resources essential to the

operation of an investment. A draft provision on performance requirements will prohibit a number of categories of measures which distort international investment flows, and the issue of introducing certain disciplines in the use of investment incentives is also under consideration

A mutually beneficial investment climate and a balanced approach to foreign investment depend not only on international disciplines applied by governments, but also on responsible behaviour of investors in the countries in which they operate. It has been proposed, therefore, to associate the OECD Guidelines for Multinational Enterprises to the MAI -- but without changing the voluntary nature of those Guidelines.

A number of important issues remain to be resolved -- for example, how and to what extent to bind subnational levels of government; how to treat measures related to culture; how to address the question of labour standards and environmental concerns, issues related to extra-territorial actions by governments and what, if any, special provisions are necessary for regional international economic organisations, such as the European Union. Despite these and other unresolved issues, a great deal of progress has already been achieved in preparing texts, or options for text, on a wide range of subjects and, more broadly, in preparing the ground for the successful outcome of the negotiations.

Another important area of work relates to the specific reservations that each country will be permitted to lodge under the Agreement. This requires negotiations to assess how far countries are willing to go towards eliminating existing non-conforming measures, or at least setting timetables for rolling back such measures in the future. This process of negotiating the specific commitments of the participating countries is being carried out in parallel with the negotiations on the remaining unresolved aspects of the text of the Agreement.

There continues to be strong momentum and political will behind the negotiations. By the OECD Ministerial meeting in late May, it should be possible to have a fairly complete text with only a limited number of open issues. Some issues especially those of a more "political" nature, might not be resolved until the negotiation of liberalisation commitments is complete.

III. What interest may non-Members have in joining the MAI

When OECD Ministers launched the negotiations in 1995, they emphasised the open character of the MAI -- specifically, that it should be a free-standing agreement, open to accession by non-OECD Members willing and able to meet its requirements.

Non-OECD Members will be expected to accept the same core obligations of the MAI as OECD countries. Therefore, the process of accession would require each candidate to negotiate with other Contracting Parties both the restrictions it may be allowed to maintain through specific reservations and those it will need to adjust in order to conform to the MAI obligations. (This will be similar to the process now underway between the OECD countries.) Such negotiations with the most interested countries could start fairly soon -- and before the agreement is ratified and enters into force. Countries that complete that process before the Agreement comes into force could become "Founding Members" of the MAI.

As I noted earlier, foreign direct investment inflows into the rapidly growing non-member economies of Asia have increased dramatically, with their share rising from one tenth of world inflows in the early 1980s to one quarter today, reaching almost \$65 billion in 1995. Does this impressive record mean that these countries need not concern themselves about future global competition for investments? Some have argued this, but I would caution any country from resting on its past success. Future capital

needs in the region are immense and the competition from other parts of the world will surely be very strong. Therefore, I believe that even the most dynamic of the Asian economies should carefully consider one of the major likely benefits from participation in the MAI, namely, the greater attractiveness for potential foreign investors due to the country's international commitment to high standards of protection, treatment and legal security for those investors. The returns are likely to be higher than those resulting from bilateral treaties because the MAI will cover all phases of investment, including the entry and post-establishment phase, and will include stronger dispute settlement provisions.

The trend in outflows of FDI from Asian non-member economies has also been strongly positive: the share of these economies in world FDI outflows has grown from almost nothing in 1981 to 12 per cent today. As a group, these economies invest more abroad than any single OECD country except the United States. Indeed, some of these economies have become net outward investors in their own right. Membership in the MAI would provide greater protection, treatment and legal security for a country's outward investments. Although it is likely that some benefits may flow automatically from the MFN provisions of the GATS and bilateral investment treaties, the scope of the MAI is much broader than these agreements since it includes all economic sectors, including manufacturing and natural resources as well as services;

Finally, it is important to note that signing on to the MAI would give a country access to the "Parties Group", which will be the entity responsible for the implementation and operation of the Agreement. This Group will also be important for addressing any issues on the built-in agenda for future work and for any future review of the Agreement. Non-OECD Members, would thereby be able to participate in future negotiations conducted under the MAI.

It is, of course, for each country to decide where its national interest lies. This Symposium provides a unique occasion for the non-OECD participants to become better informed about the MAI, to exchange views on the MAI with a number of the negotiators and to discuss the possible implications for your countries and regions. You can be assured that the views you express here will receive the attention of the MAI Negotiating Group.

Thank you.

THE SCOPE OF THE MAI

Robert Ley, OECD Secretariat¹

I. Introduction

As Mr. Engering has said, the scope of the MAI has been at the forefront of the negotiations since they began in earnest one and a half years ago, and many hours of discussion have been devoted to the subject since then. A number of important issues have still to be decided, but the most important elements were put into place in January when the Negotiating Group agreed on definitions of “investor” and “investment” that you have before you.²

II. Defining “Investor” and “Investment”

Of course, the definitions have no meaning unless you insert them into the substantive obligations of the agreement, but you have only to apply the definitions to the core obligations of national treatment and MFN treatment to appreciate that the scope of the MAI is very broad. Initially, it was thought by some that the agreement would deal only with foreign direct investment by enterprises, but it will in fact be much more than that.

The key elements of these definitions are as follows:

-- Investors may be natural persons (whether nationals or permanent residents)

-- Investments include direct investments (the creation, expansion or participation in an enterprise), but also portfolio investments (whether debt or equity), real estate, intellectual property rights, rights under contract and rights conferred by authorisations or permits. The definition of “investment” is open-ended so the list of assets is only illustrative.

It is important to appreciate that the MAI covers both the making of an investment and the investment once made. The making of an investment is sometimes referred to as the “pre-establishment phase” and provides the market access feature of the MAI. This is a major element of value-added compared with most bilateral investment treaties which are limited to the protection of investments after they are made. The making of investments is covered by the MAI both “cross-border” when the investor is a non-resident, and within the territory of the Contracting Party if the foreign investor has become a resident of the country concerned, for example by establishing a subsidiary incorporated under host country law.

¹ Mr. Ley is Head of the Division on Capital Movements, International Investment and Services Division, Directorate for Financial, Fiscal and Enterprise Affairs.

² Selected Extracts from the Draft Consolidated Text of the MAI

The MAI will cover all sectors of the economy, including agriculture and natural resources, manufacturing and services. Financial experts have made proposals for additional provisions which may apply to the financial sector only or may be generalised.

Investments made prior to the MAI's entry into force will also be covered, as is customary in BITs.

III. The Treatment of Certain Items in the Definition of Investment

As can be seen from the footnotes to the definitions of investor and investment, you will see that further work is needed in five specific areas. In each case the question is not whether the topic in question should remain in the definition of investment -- it is agreed that all five topics will be part of the definition -- but rather whether the terms used need definition or refinement and whether all the investments under the relevant heading should be covered by all the obligations of the MAI.

A brief comment on each one.

i) Indirect investment: It is agreed that indirect investments will be covered when they are made into an MAI country via a subsidiary established in the same MAI country. It is also agreed that investments made from one MAI country to another will be covered even if the investor is an enterprise owned or controlled by interests outside the MAI zone. But views differ on whether an investment should be covered by the MAI if it is made from one MAI country to another MAI country in the case where the investment is made through a subsidiary located outside the MAI zone. It would be interesting to have the views of participants on this issue.

ii) Intellectual Property: Many issues are being examined in relation to intellectual property and a lot more technical work is needed before the necessary political choices can be made. Let me mention a few of these questions: Should intellectual property be defined broadly or narrowly for the purpose of the MAI? Should the definition follow the TRIPS agreement or go beyond that? Should future intellectual property rights be covered or only existing rights? Should intellectual property rights be covered by the National Treatment obligations? Would it be useful to bring intellectual property rights within the expropriation and free transfer provisions? Delegations have different views on all these questions. Some delegations question whether some intellectual property rights (those relating to artistic and literary works) should be considered to have the characteristics of an investment.

iii) Concessions is another difficult area where the term seems to have different meanings to different countries. Some see concessions as just another word for authorisation or permit. Others liken concessions to monopoly rights and still others see concessions as primarily a question of natural resources management and conservation over which host governments should retain sovereign rights.

iv) Public debt: This issue may be on the way to resolution as most countries seem to think now that public debt should be treated in the same way as private debt, except in specific circumstances -- rescheduling operations (e.g. as those organised by the Paris Club) and possibly open market operations by monetary authorities for the conduct of monetary policy.

v) Real estate: The issue here is whether the MAI should cover all real estate operations, including purely personal investments, or whether it should be limited to real estate operations of a business character.

IV. The meaning of a “measure”

Another major factor in determining the scope of the MAI is the nature of the measures to be covered.

-- It is agreed that only governmental measures will be covered. Consideration was given to covering discriminatory practices of private companies but a clear majority of delegations came against that approach as unduly interfering in private company affairs.

-- No definition of a “measure” has yet been agreed, but it is likely to include laws, regulations and administrative practices.

-- The aim of the negotiations is to cover measures at all levels of government (central, federal, state, provincial and local) as well as measures taken by regional economic integration organisations (REIOs) such as the European Community and those taken by the dependent territories of Contracting Parties.

Some measures, however, may be excluded from the agreement (“carved out”) or included only to a limited extent.

i) National Security measures will be carved out, though the text has still to be agreed.

ii) Measures taken to preserve public order may also be carved out, though some delegations do not see the need for such a carve out since non-discriminatory measures to preserve public order can be taken without offending the national treatment/MFN provisions.

iii) Prudential measures may be taken to ensure the integrity and stability of the domestic financial system and to protect investors and depositors. Measures taken for prudential purposes would be subject to an anti-abuse provision to ensure that the carve-out is not used as a means of avoiding the obligations of the MAI.

iv) Tax policy experts have recommended that tax measures be carved out of the MAI, except for transparency and expropriation. The Negotiating Group will consider this subject later this month.

A temporary safeguards provision is also being prepared to allow temporary recourse to restrictions on investment transactions and cross-border payments and transfers in the event of serious difficulties in the balance of payments or in the operation of economic or monetary policy. Many delegations initially questioned the need for this safeguard clause because it is not systematically found in BITs. However, once it was agreed to adopt a broad definition of investment allowing the MAI to cover all forms of portfolio and financial investment, a consensus developed in favour of a safeguard provision. There is now agreement in principle on the need for such a provision, but the text is still being developed.

In addition, individual countries have raised special concerns, such as the treatment of special groups of native people, cultural measures, activities in economic zones outside the mainland territory. The treatment of these matters remains to be resolved.

V. Relationship to other International Agreements

Another way of looking at the scope of the MAI is to consider its relationship to other international agreements.

a. BITs The MAI will be much broader in scope than most BITs and will largely replace the BITs in practice for relations between countries that join the MAI. However, there may be specific provisions in individual BITs that remain of value, e.g. a MFN clause or specific investment protection standards that are more favourable to investors than the MAI. If this were the case, nothing in the MAI would prevent an investor availing himself of such provisions.

b. WTO Agreements. The MAI will introduce investment protection provisions and investor to state dispute settlement provisions that do not currently exist in the WTO family of agreements. The MAI Performance Requirements Article is designed to go substantially beyond the TRIMS agreement. Whether the MAI does more than TRIPS in the field of intellectual property remains to be seen, but it is certainly possible. The most important overlap concerns the GATS. It is generally understood that the provision of cross-border services would not be covered by the MAI, but the provision of services through a commercial presence clearly overlaps with the MAI. The MAI is more ambitious than the GATS in this area, however, because it will cover all economic sectors not just services and calls for a top down approach to the scheduling of country specific reservations.

It needs to be emphasised that overlap does not mean conflict. The MAI negotiators have made it clear from the outset that there should be no disturbance to the smooth operation of the WTO, and there can be no withdrawal of the commitments OECD countries have made in the WTO agreements, including commitments to MFN. Moreover, in the MAI dispute settlement regime a procedure has been agreed to avoid forum shopping while preserving investors' legitimate freedom of choice.

c. International Monetary Fund. Overlap with the IMF's present Articles of Agreement is quite narrow, the Fund's jurisdiction being limited essentially to payments and transfers for current account transactions including returns on investment (interest, profits, dividends etc.). Overlap would be much greater if proposals currently under consideration were adopted to amend the Fund's Articles to cover capital movements both to and from member countries. Even in that case, however, the Fund is unlikely to play a significant role in the liberalisation of foreign direct investment regulations or in most investment protection matters which together lie at the heart of the MAI. The Fund also lacks mechanisms for the settlement of investment disputes comparable to that in the MAI. It is envisaged, nevertheless, to give the Fund a pre-eminent role in the implementation of the temporary safeguard procedures to the extent that the Fund has jurisdiction.

VI. Conclusion

It is clear from my remarks that the MAI is to be a very broad investment agreement and quite unique in the spectrum of existing international agreements. Many important questions are still to be resolved, but the main design is clearly emerging. These remaining questions will be the subject of intense scrutiny in the months to come as delegations negotiate in parallel the final text of the agreement and the country specific reservations they wish to lodge themselves and those they consider accepting from other countries. The scope of the MAI will finally be determined once those two parallel processes are complete.

TREATMENT AND PROTECTION OF INVESTORS AND INVESTMENTS

Robin Morgan¹

BACKGROUND

A Report to OECD Ministers in 1995 said, inter alia:

The MAI would aim to set high standards of liberalisation. Options have been identified which go well beyond the provisions of OECD instruments or provisions in other international agreements where higher standards already apply. This would result in strong obligations and commitments on national treatment, non-discrimination/MFN, transparency, standstill, roll-back and in various procedures to implement these principles. The “top-down” approach means that the only exceptions to the obligations permitted are those listed when adhering to the agreement and which are subject to progressive liberalisation.

Provisions on expropriation, compensation and the transfer of funds are key elements of investment protection. These provisions are particularly relevant in an agreement which is open to non-(OECD)Member countries. A comprehensive investment instrument would contain strong obligations in these areas and would also address issues such as subrogation, observance of other obligations, and protection from strife. The goal is to provide levels of investment promotion and protection which are at least as strong as those negotiated by Member countries in other investment treaties.

The MAI would guarantee the investor and the investment fair and equitable treatment and full protection and security. Such a general treatment provision is usually supplemented by national treatment and non-discrimination obligations which would apply to all matters of investment protection.

What has been achieved?

Definitions

The MAI defines investors and investments:

- an investor is a natural or legal person of a Contracting Party;
- an investment is any kind of asset

¹ International Financial Services Division, HM Treasury, United Kingdom

The MAI then says how you treat those investors and their investments.

Drafting Groups looked existing approaches to the treatment of investment, as in BITs, the GATS, the Energy Charter and NAFTA, and tried to create something better, but which would not conflict with other approaches.

The aim was to create simple and straightforward obligations which were clear, concise and unambiguous. [A good agreement is a short agreement!]

Treatment of Investors and Investments

The purpose of the MAI is to promote non-discrimination; it is not intended to harmonise individual countries' investment policies.

National treatment

Foreign investors must not be treated less favourably than domestic investors. An investor of one Contracting Party must have the certainty that the rules applicable to him are at least as favourable as those applicable to domestic investors.

This allows for "better than national treatment". It has been argued that the test should be strict national treatment.

Most favoured nation treatment

This requires a host country to treat investors and their investments from one Contracting no differently than investors and their investments from any other Contracting Party

Contracting Parties will always be required to give the better of MFN or NT. (This is implicit, but the Drafting Group considered it should be made explicit.)

These two provisions are the basic non-discrimination obligations in the MAI. They are intended to cover both *de jure* and *de facto* discrimination. This means that where measures do not formally provide worse treatment for a foreign investor, but nonetheless in application they have the effect of limiting national treatment and the ability of a foreign investor to compete on equal terms, such measures would be incompatible with the MAI.

These provisions are based on a comparison between the situations of foreign and domestic investors. It has yet to be settled whether this should be made explicit by reference to the circumstances of each investment.

Transparency

To ensure appropriate information is available to foreign investors, Contracting Parties are required to make publicly available all their measures which may affect the operation of the MAI. In other words an investor has a right to know all the terms and conditions which might affect him and his investment.

There is no provision for formal contact points in each Contracting Party, but there is a requirement to respond promptly to any enquiry about a Contracting Party's measures.

Prudential measures (the “prudential carve-out” for financial services)

In respect of financial services, Contracting Parties may take measure for the protection of investors, depositors policy holders or persons to whom a fiduciary duty is owed by an enterprise providing financial services, or to ensure the integrity and stability of its financial system. Where such measures do not conform with the provisions of the MAI, they shall not be used as a means of avoiding commitments or obligations under the MAI.

In essence, any measure is allowed for prudential reasons; however they must not be used as hidden discrimination. This provision mirrors that in the GATS.

It is a great comfort to people like me. However, it is not an open-ended opportunity to discriminate.

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The MAI then sets standards for investment protection. In practice there may be some overlap with the non-discrimination obligations.

Investment Protection

There are six *Investment Protection* obligations:

General Treatment

Investments shall receive fair and equitable treatment and full and constant protection and security.

Contracting Parties shall also not impair the operation of investments. The test of impairment (unreasonableness/discrimination) is still open.

Expropriation and Compensation

An expropriation, or other measure having equivalent effect, is only permitted if it is in the public interest, non-discriminatory, against payment of prompt, adequate and effective compensation, and in accordance with due process of law.

Compensation shall be paid without delay, shall be equivalent to the fair market value of the investment, shall be fully realisable and freely transferable.

Compensation shall include interest from date of expropriation to date of payment, and any exchange rate loss incurred by the investor.

Protection from strife

Where an investor suffers losses due to war, any other armed conflict, state of emergency or similar events, the host country is not obliged to pay compensation. Where a host country does pay compensation, the NT and MFN principles apply. Restitution or compensation is required in cases of requisition or unnecessary destruction.

Transfers

All payments into and out of a host country related to an investment may be freely transferred without delay. Such transfers shall include:

- initial capital and additional amounts to maintain or increase an investment;
- returns;
- payments made under a contract including a loan agreement;
- proceeds from the sale or liquidation of all or any part of an investment;
- payments of compensation ;
- payments arising out of the settlement of a dispute;
- earnings and other remuneration of personnel engaged from abroad in connection with an investment.

Such transfers shall be made in a freely convertible currency.

Restrictions on the transfer of returns in kind which are consistent with the GATT are permitted. Certain restrictions on transfers in connection with legal proceedings may also be permitted.

Some of the detail of these provisions has still to be finalised.

Subrogation

If a home country compensates one of its investors with regard to a loss that has occurred in a host country, the home country is entitled to all the rights and claims that the investor had vis-à-vis the host country.

Protection of existing investments

The MAI should cover investments irrespective of whether they have been made before or after the entry into force of the Agreement.

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General Exceptions

The MAI will contain general exceptions to non-discrimination (except as regards expropriation, compensation and protection from strife) for essential security interests and UN obligations - it is not necessary to explicitly state this. It has still to be decided whether a provision allowing discrimination on public order grounds is necessary.

TEMPORARY STAY AND WORK OF INVESTORS AND KEY PERSONNEL

Michael Grau¹

1) The 'key personnel' topic is one of several new disciplines where negotiators can prove their ability to create an agreement with high standards of liberalisation as mandated by OECD-Ministers in 1995. Business considers the possibility to bring their key personnel with them an essential for running their investments in a profitable way and as an indicator for a liberal business climate in host countries.

2) The problem of the key personnel-provision resides mainly in the political weight of labour market policies under the pressure of persistent mass unemployment in some OECD-countries and of migration. Labour ministries are closely monitored by Parliaments which often tend to restrictive short term measures against unemployment. The political support for a generous treatment of foreigners as a way to improve growth potential in a longer perspective is not always assured. Nevertheless basic agreement could be reached on a single draft article with only some square brackets.

Remaining open questions reflect this domestic policy issue rather than diverging views of negotiating countries.

3) Previous agreements as referred to by negotiators establish a general precedence of domestic labour market rules and combine this with either a best efforts clause or a partial exemption from the application of national rules. The latter solution offers stronger rights to foreign business and was therefore adopted by the MAI-negotiators. The key personnel article in its present shape thus combines two basic elements:

- a provision with a 'chapeau', subjecting the movement of key personnel to national laws, regulations and procedures affecting the entry, stay and work of natural persons. It says that Contracting parties shall grant temporary entry, stay and authorisation to work to investors committing a substantial amount of capital or to their employees in their capacity of executive, manager or specialists and being essential to the enterprise.

The grant of temporary entry and stay - not the authorisation to work - is extended to spouses and minor children.

- a second paragraph, not subject to the chapeau with national rules, sets out that entry, stay and authorisation to work may not be denied for reasons relating to labour market or other economic needs tests or numerical restrictions. With regard to these two measures national legislation does not precede over the MAI. Other restrictions of national labour laws which continue to be applicable and are not affected by this clause are for example health, safety or criminal law considerations.

¹ Mr. Grau is Counsellor, International Investment & Multinational Enterprises, German Permanent Delegation to the OECD

4) It is the view of negotiators that such a coexistence of national labour market rules and a more liberal access for foreign investors and their staff takes care of political concerns with regard to unemployment and establishes at the same time new legal rights for investors to which the relevant MAI-disciplines, mainly dispute settlement, can be applied.

In this context it is important that the negotiating parties share the assumption that any further problem of compatibility with national legislation must be addressed by legislative means at home or by country specific reservations and not by further negotiating the key personnel clause. As has become visible during the negotiations, labour market tests and also numerical restrictions will, at least in an initial phase of application of the MAI, occur in many cases, mostly with regard to specialists. The countries concerned accepted that they have to register this upon accession in the form of a country specific reservation.

5) There is an option in the text to strengthen the investors rights further: this is a bracketed non abuse clause saying that a Contracting party shall not invoke national laws as a means of evading its obligations under this article. An alternative option would be the inclusion of a general anti-abuse clause into the MAI, outside the key-personnel-article and valid for the entire agreement although it is not very clear where else such a clause could apply.

6) Apart from the anti-abuse clause, two more elements inside the draft MAI-clause continue to pose difficulties. The Negotiating group has been asked for further guidance on these:

- the requirement of previous employment of one year: there are diverging opinions among negotiating parties. Some say that the investor must retain the possibility of hiring specialised staff when he enters a new market or develops and sells a new product. Others fear that without the requirement of previous employment the risk of abuse would be excessive.

This is still bracketed text and there are good economic reasons for not including such language.

- there continues to be a controversy about whether only nationals of another contracting party or also foreigners residing permanently within its territory shall be entitled to enjoy the rights offered with regard to key personnel. The inclusion of permanent residents is, for the time being, bracketed. This point is particularly relevant with a view to specialists but does not affect the investor himself.

The idea to give investors the right to hire foreigners already holding valid permits and documentation in the host country and to not apply national employment quotas to them was originally a bracketed option within the key personnel article. During the most recent consultations agreement could be reached to include such a provision into the MAI outside the key personnel article.

7) The following issues were settled during the meetings from January through march, texts are no longer bracketed:

- the substantial amount of capital requirement: this is a complement to the definition of investors for the specific use of this article: the investor has to commit a substantial amount of capital to the enterprise enjoying the right to employ key personnel.

The background is related to migration and the example frequently cited is street trade. Those traders shall not be enjoy MAI-privileges but remain subject to ordinary migration and labour legislation.

- National governments retain the right to periodically verify the continued eligibility of key personnel.
- There is only an encouragement and no binding obligation to grant authorisation to work to spouses of key personnel.

8) One word on definitions:

There is a distinction between the investor himself and key personnel - the latter are Executives, Managers and Specialists. The specialist as the most controversial case is, according to the draft article, somebody who possesses knowledge at an advanced level of expertise and who may be required to possess specific or proprietary knowledge of the enterprises product, service, research equipment, techniques, or management.

PERFORMANCE REQUIREMENTS AND INVESTMENT INCENTIVES

Anders Ahnlid¹

1. INTRODUCTION

This presentation covers performance requirements and investment incentives, two of the five so called special topics dealt with in the MAI negotiations.

The other two issues are, on the one hand, closely linked, but, on the other hand, likely to be treated differently in the MAI.

2. PERFORMANCE REQUIREMENTS

2.1 Why an issue?

Performance requirements are requirements that governments impose on the performance of investors/enterprises in order to secure perceived economic benefits for the country as a whole or for a certain region.

Such requirements interfere in the decision making process within individual enterprises and are likely to lead to market distortions.

The MAI rules on non-discrimination are not sufficient to halt the distortions and inefficiencies created by performance requirements. Therefore, there is general agreement in the negotiations that MAI should prohibit a number of such requirements, and that this prohibition should apply to investments from contracting parties as well as from non-contracting parties.

The point of departure in this endeavour has been existing rules in the WTO -- in the Agreement on Trade Related Investment Measures, TRIMS -- and NAFTA. The aim is to go further than these rules by, first, extending them to the field of services, and, second, extending them to performance requirements that distort investment flows even if the investment in question is unrelated to international trade.

2.2 Likely outcome

The MAI work on performance requirements has advanced quite far. The negotiators are working on a draft article. It is likely to have the following content:

¹ Mr. Ahnlid is Deputy Permanent Representative, Swedish Permanent Delegation to the OECD and Chairman of the MAI Expert Group on Special Topics

2.2.1 General prohibition

First, the article will contain a general prohibition of about a dozen specific performance requirements. The final length and content of this prohibition remain to be decided. It is clear, however, that this prohibition will extend to e.g. export and local content requirements. The specific prohibitions that are more or less agreed and those that are still under discussion are listed in the document entitled "Main features of the MAI", page 9.

2.2.2 Permissible when linked to an advantage

All requirements are, however, not likely to be prohibited in all circumstances. Thus, the second part of the article will contain provisions according to which certain performance requirements will be permitted when they are linked to the receipt, by the investor, of an advantage, often in the form of an investment incentive. In this category, we find requirements such as those related to the transfer of technology, the location of headquarters and the exclusive supply to certain markets from a certain facility.

2.2.3 Exceptions

The article is likely to contain some further exceptions. First some otherwise totally forbidden performance requirements (probably b, c, d and e in the list in the "Main features-document") will be permissible in relation to the conditioning of the receipt of an advantage in connection with 1) the location of production, 2) the provision of particular services, 3) the training or employment of workers, 4) the construction of particular facilities and 5) the conduct of research and development.

Furthermore, an exception, mainly motivated by environmental concerns, has been proposed for measures that are necessary to:

- secure compliance with national laws and regulations,
- protect human, animal or plant life or health, or
- for the conservation of living or non-living exhaustible natural resources.

This possible exception is still under discussion.

In addition, the article will most likely contain an exception for some relevant performance requirements in the context of export promotion and preferential tariffs or quotas programmes. Similar exceptions have been proposed for foreign aid programmes, government procurement and privatisation.

Finally, it is worth noting that, over and above these exceptions, it will, probably, be possible to take national reservations for specific measures under the performance requirement article.

2.3 Concluding remark

It is evident that governments often link performance requirements to investment incentives. It could be argued that a reduction of performance requirements ought to moderate the use of investment incentives. If this will be the result of the MAI article on performance requirements remains to be seen.

3. INVESTMENT INCENTIVES

3.1 Why an issue?

Today, most countries actively promote foreign direct investment. As investment regimes have been substantially liberalised over recent years, competition among countries for foreign direct investment has increased. Countries have generally participated in this competition using two different means, often in combination:

- Regulatory competition, i.e. governments have sought to improve the general framework conditions for enterprises.
- Investment incentives, i.e. governments have sought to attract investment by granting advantages in the form of grants or tax holidays.

According to recent studies, the range of incentives available, and the number of countries that offer incentives, have increased considerably since the mid 1980s.

Empirical evidence tend to show that incentives do not rank high among factors determining investments. However, they may have some effect at the margin when a limited number of locations are examined for a given investment, towards the end of the decision making process.

Accordingly, governments that are eager to attract investment often tend to be prepared to offer advantages to investors. Since many governments seek to attract investment, they often find themselves engaged in costly competition with each other over particular investments.

Whether the benefits of incentives exceed their costs, and, if so, under what conditions, is a matter of debate. This question tends to divide scholars as well as countries.

3.2 Possible outcome

The split between countries is evident in the MAI negotiations. A number of quite influential OECD countries argue that MAI should not seek to discipline investment incentives. Others would be prepared to go quite far to create rules that would lead to disciplines in this field.

The discussion on investment incentives no doubt involves issues that are both complex in economic and technical terms and sensitive from a political point of view.

3.2.1 "No specific rules needed"

Many countries view investment incentives as a legitimate and useful policy tool for promotion of economic development through new investment.

Against this background, a number of countries are against specific rules on incentives in MAI. They argue that the application of national and most-favoured-nation treatment would be a sufficient outcome and constitute a step forward compared to the present situation.

Application of non-discrimination would probably lead to a certain degree of indirect discipline on investment incentives, since a requirement to extend incentives to all eligible foreign investors might increase the cost of incentive programmes in certain circumstances.

It is worth noting, however, that some countries arguing along those lines might seek country specific reservations from the rules on non-discrimination for incentives. If so, status quo would prevail.

3.2.2 "Disciplines should be introduced"

Other countries are of the view that disciplines on investment incentives would be an important element of MAI. At the same time, these countries recognise the role of incentives in certain circumstances, such as in the promotion of regional, social, environmental and R & D objectives, and they are generally seeking outcomes that would not interfere with legitimate policies directed towards the attainment of these objectives.

A number of possible options for disciplines have been put forward, but not seriously discussed. These include a ban on so called positive discrimination, i.e. better treatment for foreign investors than for domestic investors. Another suggestion has been to try to put caps on the magnitude of certain investment incentives. The question has been raised whether it would be possible to agree to a discipline for investment incentives similar to the OECD discipline on export credits.

Disciplines of this kind, it is argued, ought to be accompanied by more elaborated rules on notification and transparency, and possibly consultations, than what is generally envisaged in the MAI.

Any discipline over and above national and most-favoured nation treatment would also have to contain a definition of incentives. Some proposals for such a definition have been put forward in the negotiations. These range from an elaborated definition, based on the WTO-approach for defining subsidies, to more modest, and less specific, proposals.

The opponents to disciplines have, i.e., argued that it would be premature to introduce disciplines of this kind in MAI since they could duplicate or detract from existing and possible future WTO obligations in the field of subsidies.

The fact that investment incentives are often granted on sub-federal level-by states, provinces, regions and even at local and city level --seems to contribute to the reluctance of some participants to agree to disciplines in this area.

In addition a number of countries have argues that tax incentives, as most other tax measures, should be excluded from MAI. Given that such incentives are probably the most common ones, the effectiveness of any discipline that does not cover tax incentives could be put into question.

3.2.3 A possible compromise?

As a compromise between the extreme positions it has been proposed that the issue of additional disciplines on investment incentives should be taken up in negotiations after the entry into force of the MAI, as part of a "built-in agenda" for further work.

The mandate, or terms of reference, for such negotiations would have to be worked out before the finalization of the agreement.

In addition, specific transparency provisions could be added to a possible compromise package.

However, so far, negotiators have not devoted much time to a solution of this kind.

3.3 Concluding Remarks

An UNCTAD study on "Incentives and Foreign Direct Investment" recently concluded that "a step-by-step approach" is probably necessary to international co-operation on incentives. So far, the MAI experience would seem to confirm this thesis.

However, the scope for a first step towards multilateral co-operation on pure investment incentives in the form of further work would, in my view, seem to be within reach in the MAI negotiations.

The fact that knowledge concerning investment incentives is likely to increase with time might help the process.

In this context I would like to point out that the OECD Development Centre is running a project on "Policy Competition and FDI" in OECD and non-OECD countries. The results of this project will start to come in towards the end of the year, and might be helpful in relation to possible further work on investment incentives under MAI.

Finally, it is evident that an increasing number of non-OECD countries, including potential MAI signatories, also engage more and more actively in the incentive game. Leaving the issue of effectiveness of incentives aside, it would seem likely that it will be the countries with the "deeper pockets" that will prevail in this game in the long run. Thus, one might have expected that non-OECD countries would have a strong interest in disciplines on incentives. However, so far the inclination of non-OECD countries would, maybe somewhat surprisingly, seem to go in the opposite direction.

PRIVATISATION AND MONOPOLIES

Madalena Oliveira e Silva¹

INTRODUCTION

This paper looks at issues pertaining to privatisation and monopolies in the context of the draft Multilateral Agreement on Investment (MAI).

A key feature of this Agreement will be its respect of National Treatment (NT) and Most Favoured Nation (MFN) principles in relation to investment. This has important implications for privatisation and monopolies.

However, the issue of privatisation, as well as that which refers to the creation or maintenance of monopolies pertains, in an unquestionable way, to the competences of the State. They thus fall outside the scope of interference resulting from international conventional sources of law.

The fact that the MAI incorporates some provisions on this issue could seem to contradict this statement.

Next section explains why this contradiction is apparent rather than real and hence why it is appropriate to include provisions on privatisation and monopolies in the MAI. The second section will look into the specifics of these provisions.

I. THE RATIONALE FOR INTEGRATING PRIVATISATION AND MONOPOLIES INTO THE MAI

A. Privatisations

1. For a number of years, privatisation has been a common phenomenon not alone in OECD countries but also in other parts of the world, particularly Latin America, the transition economies and also in Asia.

The privatisation phenomenon has accelerated considerably, probably without precedent in our modern history, and it characterises the move towards the liberalisation of the world economy.

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2. As an expression of the State's discretionary competence regarding the choice of economic policies, privatisation has been, for many years, outside the regulatory oversight of international bodies, including the OECD.
3. The emergence of numerous and complex privatisation phenomena should not lead, at least in theory, to a modification of the position of international organisations, such as the OECD, on privatisation, particularly with respect to the related regulatory issues.
4. Nevertheless, the particular process of privatisation in each country insofar as it can give origin to preferential treatment distinguishing between local and foreign potential acquirers of shares or assets, may directly affect the goals of the OECD.
5. In this context, the MAI project appears to be the appropriate place to analyse the different processes implemented in various countries, its aim being the prevention or at least the limitation of differential treatment.
6. The inclusion of a discipline on privatisation in the MAI is clearly justified by the fact that, as far as the definition of investment is concerned, the acquisition of shares in a company to be privatised is regarded as nothing but an investment operation, and therefore, must be covered by all rights foreseen in the Agreement.
7. More precisely, it is intended that the rights accorded to an investor from a Contracting Party, in the pre-investment phase are not circumvented at the moment of privatisation. We would consider that this moment occurs when the State or any public entity, owners of the shares of the company to be privatised, transfers those shares to the acquirers, whether they are natural or legal persons.
8. The principle of non discrimination in acquiring shares and assets of a privatised company is the key feature of the MAI concerning privatisation. In other words, it represents the pivot around which the preparation of the MAI provisions should be articulated. Even here, the principles of National Treatment (NT) or Most Favoured Nation (MFN) treatment underlies this legal construction.

B. Monopolies

1. The line of reasoning that has led us to the conclusion about the appropriateness of the integration of privatisation into the MAI may be transposed *mutatis mutandis* to the issue of the creation or maintenance of monopolies.
2. Hence, and similarly to what has been said above (see A.2), the State's discretionary competence concerning the choice of economic policies, and especially, regarding the creation or maintenance of monopolies in a particular national economic sector may be considered, *vis-à-vis* the principle itself, incompatible with international regulations.
3. In view of this fact, it becomes easy to explain why, at least on the level of principles, the monopolies' issue has remained outside the regulatory framework covered by international organisations such as the OECD.
4. Nevertheless and without challenging the principle and its exercise, a question can be raised here, though slightly different from the one that emerged on privatisation. To what extent does the

establishment or maintenance of a monopoly affect the rights that other economic agents have acquired via international conventions, in this case the MAI?

5. That being said, it seems coherent that the MAI should, insofar as it grants rights to foreign investors, include provisions aimed at the prevention of violation of these rights. Such breach of the MAI obligations could take place as a result of the activity of monopolies. We shall thus see (infra, section II) that such provisions are based on the principle of non discrimination, applied to monopolies practices (sales or purchase of monopoly goods and services).

II THE CONTENT OF MAI PROVISIONS

A. Privatisation

1. In the article concerning privatisation, the basic principle underlying the whole construction is that the right to privatise remains, unquestionably, in the hands of each State. Accordingly, this article states that nothing in the MAI shall be construed as imposing an obligation on a Contracting Party to privatise.

2. The current draft provision stresses the applicability of the principle of non discrimination regarding privatisation, although some negotiators consider this unnecessary, since MAI core provisions on National Treatment (NT) or Most Favoured Nation Treatment (MFN) would also apply to the access of potential acquirers of shares and /or assets resulting from privatisation.

The obligation of a Contracting Party to accord NT/MFN treatment applies both to initial and subsequent sales associated with the privatisation operation, provided that those secondary transactions are ruled by provisions enacted by the Government. Clearly, it is not intended to cover the behaviour of private entities, which falls under the issue of corporate practices (measures taken by corporations, independently of government actions). These are also covered in the MAI.

3. One of the issues raising more concern is linked to specific privatisation rules on the ownership or control of privatised assets. The so-called “special shares agreements”, such as the retention of “golden shares”, management/employee buy-outs, special schemes for the public, choice of a particular category of buyers, obligations impending on shareholders requiring the maintenance of their shares for a certain period of time and other similar arrangements, might violate NT/MFN obligations. This would happen whenever they discriminate between investors, whether explicitly or not, granting de facto or de jure preferential treatment to some shareholders.

For a large majority of delegations, such “special shares arrangements” should not be considered inconsistent with NT/MFN treatment, unless they explicitly or intentionally discriminate against foreign investors. According to others, these special schemes would result in discrimination and, therefore, should be prohibited under the MAI. If this latter approach were to be adopted, reservations would have to be lodged whenever the privatisation program or a specific privatisation transaction entails such arrangements. In turn, this has led some delegations to raise the need for precautionary reservations.

4. This article also contains a definition of privatisation. It was considered necessary to include such a provision to provide uniform interpretation of the concept, given the complexity and variety of cases covered by this notion. Although views differ on whether the definition of privatisation should be “asset-based”, “entity-based” or a combination of these two approaches, the majority of the negotiators are of the opinion that the best solution would be an asset-based definition.

5. As a reflex of the general transparency rule, the article on privatisation foresees an obligation of transparency. Under the terms of this obligation, a Contracting Party should make publicly available all the conditions and procedures relating to a specific case of a privatisation.

This can be ensured by giving any information relevant to the privatisation process, such as clearly defined bidding procedures, selection criteria for evaluating bids and financial statements on the company to be privatised. However, the draft article does not specify which information should be made available, leaving that, naturally, to the discretion of the Contracting Party concerned.

The obligation of transparency derives from the application of NT/MFN principles. In fact, making the information on a privatisation operation publicly available provides equal opportunities for national and foreign investors, thus avoiding discrimination.

Countries must be aware of the fact that the lack of transparency can lead to a perception of unfair dealing, even if that is not the case, which can reduce the interest of potential investors.

Being such a crucial aspect of privatisation, it was considered indispensable to include a transparency provision in this article of the MAI.

B. Monopolies

1. Similarly to the MAI provision on privatisation, the article on monopolies confirms that the right to establish or maintain a monopoly remains in the hands of the State. Views differ on whether this principle should be expressly stated or not.

2. The MAI envisages to discipline the behaviour of monopolies, aiming to prevent discrimination against foreign investors. In order to ensure that monopolies act in a manner that is not inconsistent with NT/MFN obligations, the negotiators are trying to define a clear set of rules, mainly connected to the purchase and sale of goods and services.

It was agreed that monopolies should provide non-discriminatory treatment to investments of investors of a Contracting Party in its sale of the monopoly good or service. In addition, monopolies should also provide non-discriminatory treatment to these investments in its purchase of the monopoly goods or services (with the exception of government procurement).

There is also general agreement that monopolies exercising any kind of regulatory, administrative or other government-delegated authority should act in a manner that is not inconsistent with MAI obligations on NT/MFN.

However, discussions are still under way on where these issues would be adequately addressed. A possible solution could be to deal with them in the context of a general anti-circumvention clause for the MAI.

3. Concerns have also been raised about anti-competitive practices, including through the discriminatory provision of the monopoly good or service, cross-subsidisation or predatory conduct, in non-monopolised markets. There seems to be a preference for the inclusion of a provision restraining government-designated monopolies from engaging in these practices.

4. The article on monopolies also provides for a definition. At this stage, negotiators are still trying to delimitate the core elements essential to characterise a monopoly.

5. Some delegations have expressed concern on demonopolisation, in particular on whether the principle of stand-still would apply in these cases. In fact, some countries might need to lodge new reservations, despite a general agreement on the avoidance of introduction of new reservations after the entry into force of the MAI, because demonopolisation has the effect of extending the obligations under the Agreement to a new area.

6. Whether state enterprises and concessions should also be addressed or not in addition to the rules on monopolies remains to be decided.

IV. CONCLUSION

Given that work on the MAI is still in progress, it is still too early to draw any firm conclusions. This would compromise the position of the Negotiating Parties.

Nevertheless it is already clear that a certain number of principles will be upheld. These are:

- First, the discretionary competence of States on issues relating to privatisations and monopolies and,
- Secondly, the obligation of Contracting Parties to observe the principles of non-discrimination in relation to these issues.

DISPUTE SETTLEMENT

Ambassador Marino Baldi¹

The MAI shall be an agreement with high standards for the treatment and protection of investments. In order that such high standards are properly implemented by Contracting Parties, an effective dispute settlement system is necessary which, in principle, covers all obligations under the MAI. Such a dispute settlement system is needed not only because it helps to solve possible disputes under the MAI through formal proceedings, but also -- and perhaps even more importantly -- because it encourages dispute avoidance and helps to resolve divergencies of views informally. It is, nevertheless, highly important for the credibility and the viability of the MAI that Contracting Parties to a dispute have recourse to binding arbitration in the event of an alleged breach of the Agreement and this in two ways: for States wishing to take action against another state (state-to-state arbitration) and for investors wishing to directly submit a case to arbitration against their host country (investor-to-state arbitration).

The MAI Negotiating Group entrusted Expert Group N°1 on Dispute Settlement and Geographical Scope with the task of developing a dispute settlement system. After thorough discussions on the scope and the possible features of such a system, broad agreement was reached on the basic elements and on most of the issues that came up in the negotiations. The text that resulted from this work was recently submitted to the Negotiating Group for further consideration and resolution of the outstanding points. In my presentation, I shall first give an overview of the main elements of the dispute settlement system, after which I shall briefly explain some of the issues that proved the more difficult ones in our negotiations.

I. Main characteristics of the system

i) State-to-state arbitration

With regard to state-to-state arbitration, five points can be highlighted:

- a) Following the precedent set by the WTO, the Contracting Parties to the dispute should, as a first step, attempt to resolve their dispute through consultations. If the Contracting Parties fail to come to an amicable solution, the dispute may, at the request of any Contracting Party to the dispute, be submitted to an *arbitral panel*.
- b) Panels shall consist of either three or five members. Three members will be selected by agreement of the Parties to the dispute, based on a proposal made by the Secretary-General of ICSID. Either disputing Party can opt for a five member panel, in which case each will

1. 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, Bern, Switzerland.

appoint one additional member. This represents a compromise between those favouring an arbitrator being appointed by each of the two disputing parties (“party arbitrators”), as in most bilateral investment agreements, and those believing that a majority of non-party arbitrators is preferable for a multilateral agreement, which should develop an institutional jurisprudence.

- c) The MAI will set out basic rules and procedures for state-to-state arbitration. However, for particular disputes, the Parties to the dispute can always agree to apply modified rules. If gaps in the MAI rules appear during a dispute and the Parties are not able to agree on supplementary rules, the PCA Optional Rules for Arbitrating Disputes between two States (=UNCITRAL rules) serve as default rules.
- d) The substantive law to be applied would be the provisions of the MAI, but other international laws would be relevant as concerns the interpretation and application of a treaty. Domestic law could be taken into account where it is relevant to and consistent with the MAI.
- e) Awards issued by a Panel will be final and binding upon the Parties to the dispute. An award shall be provided first to the Parties as a draft to give them the opportunity to comment. This procedural safety valve should help to avoid aberrant decisions, particularly with respect to questions of fact. Possible remedies that a panel may include in an award are: a declaration that that an action in contravention of a provision of the MAI; the granting of a pecuniary award; a recommendation that a Party bring its measures into conformity with the MAI; or any relief to which the Party against whom the award is made consents (this may include restitution in kind).

ii) Investor to state arbitration

There has always been agreement that in addition to state-to-state arbitration there should exist an investor-to-state procedure. Investors generally wish to have at their disposal a dispute settlement mechanism that they can activate. Governments also see advantages in dispute settlement procedures to which they do not need to become a party. Yet, if there is general agreement that the MAI should provide for investor-to-state arbitration, it is not yet absolutely clear whether such arbitration should cover all disciplines of the MAI.

What would be the main characteristics of investor-to-state arbitration? Three basic elements may be mentioned:

- a) The investor may choose whether to submit the dispute for resolution to one of the following:
 - any competent court or administrative tribunal of the Contracting Party to the dispute;
 - in accordance with any dispute settlement procedure agreed on prior to the dispute arising; or
 - the procedures provided for by the MAI.
- b) MAI Parties, through the adoption of the Agreement, will give unconditional consent to submission of a covered dispute to arbitration, under:
 - the ICSID rules of arbitration or under the rules of the ICSID Additional Facility;
 - the UNCITRAL rules; or
 - the ICC Court of Arbitration.

Prior consent by the Contracting Parties practically means that in a given case it is exclusively up to the investor to decide whether or not to refer the dispute to arbitration.

- c) The forms of relief, or awards, that any of these tribunals may provide will be specified in the MAI. They include: a declaration that the Contracting Party has failed to comply with its obligations under the MAI; pecuniary compensation; restitution in kind in appropriate cases and, with the consent of all Parties to the dispute, any other form of relief.

II. Difficult issues and open questions

Let me now, after this description of the dispute settlement system as a whole, turn to some of the issues that in our negotiations proved to be politically sensitive and on which it was, or still is, particularly difficult to find solutions.

a) State-to-state arbitration

Role of the Parties Group

An important question, which may still not be entirely solved, is whether the Parties Group should have a role in dispute settlement, particularly as a forum for multilateral consultations that precede state-to-state arbitration in addition to bilateral consultations. We tentatively agreed that the Parties Group should have such a role, though a limited one: in the event bilateral consultations have failed to resolve a dispute, the Parties to the dispute may, by agreement, request the Parties Group to consider the matter and to make the recommendations it deems appropriate. The more straightforward solution supported by some delegations would have been a unilateral right of the Parties to the dispute to request multilateral consultations.

Ripeness of a dispute for arbitration

Another difficult issue within the state-to-state procedure that so far has only been solved on a provisional basis, relates to the question of when a dispute is ripe for arbitration. The main question is whether a Party that wants to challenge a measure of another Contracting Party would have to demonstrate concrete harmful effects of that or whether potential harmful effects (abstract non-compliance with the MAI) would suffice. As a result of our discussions we drew the line somewhat differently: on the one hand we found that merely theoretical harmful effects should not prompt a “legal dispute”. On the other hand an immediate threat of harm or damage could in our view well constitute a case for arbitration. At what point a dispute would be ripe for arbitration would ultimately be for an arbitral panel to decide, in the light of all the relevant circumstances.

Enforcement of awards

Another important unsolved question concerns the enforcement of awards. What measures or countermeasures shall be permitted to bring about compliance with an arbitral award. Possible measures are the suspension of the non-complying Party’s voting right in the Parties Group and its right to invoke the dispute settlement provisions of the MAI. The point at issue is what countermeasures should be allowed: should the MAI explicitly provide for measures which could be taken against a Contracting Party that does not comply with an arbitral award? If so, should such measures be confined to the withdrawal of concessions under the MAI or should no such limits be imposed (with the consequence that countermeasures would be allowed if taken in conformity with general principles of public international

law)? Another possible approach would be not to permit countermeasures and instead provide for the payment of pecuniary compensation (punitive damages).

b) Investor to state arbitration

Scope of arbitration procedure

The scope of investor-to-state arbitration has been debated at great length. The main question was whether investor-to-state procedures should apply to all MAI obligations, including those relating to the pre-establishment phase of an investment, or whether such procedures should only be applicable to post-establishment questions? We eventually decided not to make use of the distinction between pre-and post-establishment issues in relation to dispute settlement (the distinction would anyway not have been very practicable) and in principle to subject all MAI obligations to both dispute settlement procedures, i.e. state-to-state and investor-to-state procedures. It should, however, be mentioned in this context that some delegations take the view that a few particular MAI disciplines should be excluded from investor-to-state dispute settlement.

Prior consent

Although I mentioned prior consent as one of the main characteristics of the investor-to-state procedure, which it undoubtedly is, it should be noted that a few delegations still do not accept the idea of prior consent at all. The draft dispute settlement text provides for prior consent without mentioning any possibility for country specific reservations. The countries in question will therefore have to find a solution to their problem. There is one important qualification to the prior consent rule: Contracting Parties will be allowed to withhold consent in cases where the investor has previously submitted the dispute either to a national court or to international arbitration in accordance with any other dispute settlement procedure. In other words: Contracting Parties are entitled to impose what is called a “fork in the road”.

Standing

There was much debate in the negotiations on whether a company established in a MAI country that is controlled by an investor of another MAI country would have standing to act as the foreign investor in bringing a claim to arbitration against the host government. To take an example: would, in a case involving Volkswagen United States as an investment of Volkswagen Germany, the former company, i.e. Volkswagen US, have standing before an arbitral tribunal or would only Volkswagen Germany, as the investor, be entitled to submit the case to international arbitration? There are two good arguments in favour of the more generous of these solutions (the two companies would alternatively have standing) but also understandable concerns. The Expert Group on Dispute Settlement decided to give standing to the investment (in my example, Volkswagen US) but also to allow country specific reservations with respect to this rule.

THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, AND ENVIRONMENT AND LABOUR ISSUES

Barbara Griffiths¹

Introduction

It is a pleasure for me to speak with you today about the Multilateral Agreement on Investment. The United States was one of the earliest supporters of the negotiation of a multilateral agreement, as we recognised the need to eliminate barriers to investment in what is rapidly becoming a globalised market place. We remain committed to successfully concluding negotiation of an MAI that establishes high standards for investment liberalisation and protection. We genuinely hope that all of the countries you represent, when they are willing and able to take on its high standards commitments, will seriously consider acceding to the MAI. Let me turn now to the MAI's treatment of labour and environmental issues, focusing on our effort to associate the OECD Guidelines for Multinational Enterprises with the MAI.

OECD Guidelines

The OECD Guidelines for Multinational Enterprises are recommendations to enterprises from OECD governments to help ensure that multinational business operate in harmony with the policies of the countries where they operate. These voluntary standards cover a wide range of MNEs' operations: general policies, information disclosure, competition, financing, taxation, employment and industrial relations, environment and science and technology. For example, MNEs are encouraged to respect the right of their employees to be represented by trade unions, and to provide reasonable notice to employees of changes in the enterprise's operations that would have major effects upon the employees' livelihoods. MNEs are also encouraged to assess, and take into account in decision making, foreseeable environmental and environmentally related health consequences of their activities.

Since the Guidelines' adoption in 1976, the OECD has given attention to making them known, and has established follow-up procedures to assist in their implementation. This includes the establishment of Contact Points in Member countries to deal with Guidelines issues, regular OECD reviews of the Guidelines, periodic consultations with the business and industry and trade union advisory committees of the OECD, and promotional activities.

The Guidelines are part of a package of OECD instruments designed to facilitate direct investment among OECD Members, and to enhance their investment climates. For this reason, there is

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broad support for associating the Guidelines with the MAI, without changing their legal nature as non-binding commitments.

Although differences exist over the technical means by which association of the Guidelines will be accomplished, I believe we will ultimately agree to endorse them, and to allow future MAI parties to participate in the updating of the Guidelines, and in the follow-up procedures I mentioned earlier.

Environment

Delegations are in general agreement that our objectives of a high standard agreement and increased liberalisation can be consistent with our commitment to environmental protection and sustainable development. There is substantial support for the inclusion of provisions reflecting both of those sets of commitments. I believe we will ultimately agree on provisions, in addition to the Guidelines, both in the Preamble and in the text, that will assure that this object will be realised.

An MAI Drafting Group is working out the details of Preamble text that will inscribe the intention that liberalisation of international investment flows and sound environmental practices be mutually reinforcing. The same Group is near agreement on language, similar to that contained in the investment chapter of the NAFTA, that would discourage Contracting Parties from relaxing domestic health, safety and environmental measures as a means of encouraging investment. The dispute settlement experts group has also recommended a provision that would enable an arbitral panel to obtain reports from experts on any factual issue concerning environmental, health, safety or other scientific or technical matters raised by a disputing Contracting Party in a proceeding. We in the United States are continuing to look at additional ways in which we can ensure that our investment and environmental policy objectives remain mutually reinforcing.

Labour

As I mentioned earlier, associating the Guidelines for Multinational Enterprises with the MAI would address a number of concerns of particular interest to labour. Delegations are also considering an approach to labour issues that is similar to that taken toward the environment. The Drafting Group working on the Preamble is discussing language that would reflect the Parties' commitment to observance of internationally recognised core labour standards. That Group is also considering language that would discourage members from relaxing core labour standards as a means of encouraging investment.

ACCESSION TO THE MAI

Nick Griffiths¹

I. Legal Framework

It is understood that OECD Members will sign a Final Act as well as the MAI itself. The main purpose of the Final Act will be to provide a formal basis for the preparatory work before the MAI enters into force. This would include negotiations/decisions on applications to join by non-member countries.

The Final Act will probably name a target date for entry into force, for example, a year or so later. The final decision, however, is likely to be left to the signatories, probably on similar lines to the mechanism used for the WTO.

II. Institutions: the Preparatory Group and the Parties Group

The Final Act will establish a Preparatory Group with all signatories as members. This would include all non-OECD signatories. As well as negotiating with potential MAI members, the Group will also be responsible for the setting up of administrative arrangements, secretariat, budget, etc.

The Parties Group will come into operation when the MAI comes into force. There is still some uncertainty about its character. Some see the MAI as simply a framework of rights and obligations together with a procedure for settlement of disputes. The Parties Group would therefore concentrate on the important task of handling new accessions. Others see the Parties Group as a new institution to act as a forum for debate and for carrying forward a wider policy agenda.

The decision-making rules for the Parties Group are likely to be based on consensus as much as possible, although most delegations recognise the need for some flexibility. It is not yet clear whether decisions on accessions will be based on consensus, or on some form of majority vote.

III. Accession

The draft Article in the MAI Consolidated Text dealing with the Preparatory Group gives the Group the power to:

- conduct discussions with non-signatories to the Final Act.
- conduct discussions with interested non-signatories to the Final Act and make decisions on their eligibility to become a Signatory to the Agreement.

¹ Mr. Griffiths is First Secretary, Trade and Investment, United Kingdom Delegation to the OECD.

The draft Article on accessions reads as follows:

1. This agreement shall be open for accession by any State, regional economic integration organisation, and any separate customs territory which possesses full autonomy in the conduct of matters covered by this agreement, which is willing and able to undertake its obligations on terms agreed between it and the Parties acting through the Parties Group.
2. Decisions on accession shall be taken by the Parties Group.
3. Accession shall take effect thirty days from the date of deposit of the instruments of accession with the Depositary.

OECD members will thus have the option either of joining the MAI as original signatories before it enters into force, or of acceding to the MAI after it enters into force. There is unlikely to be much procedural difference between the two, but original signatories would have the advantage of being able to participate in the Preparatory Group. The process of accession will be the same for all, including any OECD Members who were not original signatories. The basic requirement for signing the Agreement will be the country's willingness and ability to accept the core obligations of the MAI. Each country, whether an OECD Member or not, will be able to negotiate its terms of accession, and in particular its country-specific reservations.

It has been more-or-less agreed that it will be left to the Preparatory and Parties Groups to work out the mechanics and conditions for accession. In practice a minimum standard will probably emerge, although this is unlikely to be formally defined. MAI members will naturally be reluctant to accept standards of liberalisation that are significantly worse than the lowest member country standard. They will wish to maintain the MAI as a high standard agreement, which gives investors proper security. To that end it has been broadly agreed that there should be no reservations on systemic matters, such as the definition of investment, investor protection obligations or the core elements of the dispute settlement regime. Reservations should thus focus on the substantive obligations of the MAI, notably national treatment and MFN. It is likely that accession will involve some form of examination as part of the negotiating process, perhaps on similar lines to the WTO accession process, or to OECD style examinations.

It is possible that there might be some form of transition period for new applicants, by which they could be invited to accede at an overall level of liberalisation below the required standard, subject to an obligation to reach that standard within an agreed time-frame. This is also likely to be left to the Preparatory Group to decide.

IV Conclusion

The MAI will be a free-standing international treaty open to accession to OECD members and non-members alike. All MAI members will participate on an equal basis.

OECD members are united in their wish to see the benefits of MAI membership extended to all who wish to join it, and are able to meet its obligations. The draft provisions in the MAI text are designed to enable this process to begin soon after the Final Act is signed.

SYMPOSIUM ON THE MULTILATERAL AGREEMENT ON INVESTMENT

Seoul, Korea, 3-4 April 1997

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