

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

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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MULTILATERAL AGREEMENT ON INVESTMENT

(Report by the Negotiating Group)¹

SUMMARY

Since the launching of negotiations in 1995, major progress has been made in developing a Multilateral Agreement on Investment (MAI) which would provide a comprehensive framework for investment with high standards of liberalisation and investment protection, and with effective dispute settlement. More work, however, is needed to realise the goals set by Ministers.

Text has been drafted on most elements of the MAI but further refinement is needed and policy choices have still to be made on outstanding issues. Substantial progress has been made in providing for a broad definition of investor and investment, fair and non-discriminatory treatment for foreign investors, high standards of investment protection, and an effective dispute settlement mechanism. New areas not satisfactorily covered by existing OECD instruments will come under MAI disciplines.

Final agreement will depend on achieving a satisfactory scope and balance of commitments among the negotiating parties, including agreement on the text, exceptions and safeguards, and country specific reservations. Negotiators are aware that a major effort will be required to ensure successful conclusion of the MAI.

The MAI is to be a free standing treaty, open to accession by non-Members who are willing and able to meet its obligations. Considerable effort has been made to inform non-Members and to provide first-hand opportunities for discussions as the MAI negotiations have progressed. Activities included regular briefings of embassy representatives in Paris, and regional meetings for Latin America, Asia, and Baltic countries.

The ambitious and complex nature of the MAI raises technical challenges and important policy considerations. There are outstanding issues which might only be resolved in the final stage of negotiations but for which solutions are already being explored. Negotiations aimed at achieving a high level of liberalisation and investment protection need to be pursued.

¹ The Negotiating Group is chaired by Mr. Frans Engering (The Netherlands). The vice-chairmen are Mr. Alan Larson (United States) and Mr. Kenichi Suganuma (Japan).

STATE OF PLAY: RESULTS ACHIEVED AND FURTHER WORK

Scope of the MAI

The MAI is to be a comprehensive agreement covering all forms of investment coming from MAI investors, including the establishment of enterprises and the activities of established foreign-owned or controlled enterprises. Its aim is to apply MAI disciplines to all sectors and at all levels of government. It extends beyond traditional foreign direct investment to encompass portfolio investment and intangible assets. Further work is focusing on intellectual property rights, indirect investment, concessions, public debt and real estate.

Treatment of Investors and Investments

Broad obligations on national treatment and most favoured nation treatment (MFN) are central elements of the MAI. There is an understanding that de jure and de facto discrimination against foreign investors and their investments are covered, although more work is needed on de facto discrimination. National treatment and MFN apply to all investment phases with scope for lodging country specific reservations.

Texts are being considered concerning the entry, stay and work of investors and key personnel, the participation of foreign investors in privatisation activities, investment incentives, a prohibition against certain performance requirements imposed on investors, and a prohibition of nationality requirements for senior management positions. Delegations are discussing how to treat issues relating to monopolies, concessions, and state enterprises.

The obligations of the agreement will apply to all investments related to financial services, including banking, securities and insurance activities. Special provisions on financial services have been drafted including access to information transfer and data processing. Whether issues addressed in these provisions should be dealt with horizontally is still under consideration. The MAI will allow financial authorities to take prudential measures with respect to financial services, including measures to protect investors and depositors or to protect the integrity of their financial system. There are different views with respect to proposals addressing market access issues in the financial services sector.

There is agreement that the MAI will contain a single article dealing with taxation matters following the approach of a general "carve-out" of taxation in the MAI, with some aspects of taxation "carved in". The MAI will not interfere with the ability of governments to take measures to prevent tax avoidance or evasion nor will it conflict with the provisions and procedures of bilateral tax treaties. The taxation article will include disciplines on expropriation and transparency. Whether and to what extent other MAI provisions may apply to taxation is not yet resolved.

Concerns have been expressed relating to the protection and conservation of the environment and sustainable development. Several approaches to address these concerns in the MAI are being examined, including a provision which calls on governments not to lower standards in an effort to attract foreign investment. Delegations indicated that additional proposals will be presented. Similar approaches are being considered with respect to labour standards.

There is a proposal that the MAI should include a specific provision dealing with measures taken by Contracting Parties which are members of regional economic integration organisations. Views differ on this matter.

There are divergent views on how to address the issue of conflicting jurisdiction. Proposals have been made to incorporate in the MAI provisions aimed at avoiding conflicting requirements and prohibiting secondary investment boycotts. Countries are exploring appropriate solutions.

Protection of Investors and Investment

The MAI aims to provide high standards of investment protection based on the principles enshrined in bilateral investment treaties. Texts have been developed on the general treatment of investors and investments, expropriation, protection from strife, transfer of funds, subrogation and the protection of existing investments. Some outstanding questions remain to be settled.

Dispute Settlement

The MAI will encourage the resolution of disputes through negotiation or consultation among the Parties concerned. Where investment disputes covered by the MAI cannot be settled amicably, detailed procedures have been worked out which would allow submission of the dispute for binding investor-to-state or state-to-state dispute settlement. Different options remain in some cases, in particular in the field of multilateral consultations and concerning the scope of dispute settlement. The dispute settlement text and the remaining unresolved issues are being examined by the Negotiating Group.

General Exceptions and Safeguards

The MAI would allow Contracting Parties to take measures to protect their essential security interests and the fulfilment of their obligations under the United Nations Charter concerning the maintenance of international peace and security. Discussions continue on a clause to prevent abuse. There are different views whether the MAI should contain a general exception for public order.

Given the broad definition of investment, a temporary safeguard provision has been developed to allow dispensation from certain disciplines of the MAI in the event of serious balance of payments and external financial difficulties or where capital movements cause serious difficulties for monetary or exchange rate policies. Recourse to the safeguard clause would be subject to surveillance by the Parties Group and the IMF. A provision is being considered to carve-out transactions carried out by a central bank or monetary authority in the pursuit of monetary or exchange rate policies.

Views diverge on how to address cultural matters specifically in the MAI; different approaches have been proposed including a general exception for cultural measures or country specific reservations.

Country Specific Reservations

A top-down approach in the MAI would permit non-conforming measures to be maintained provided they are covered by country specific reservations. All delegations have now submitted a preliminary list of specific reservations. Work is continuing to identify mechanisms to achieve standstill and rollback.

Relation to Other International Instruments

It has been proposed to associate the OECD Guidelines on Multinational Enterprises with the MAI without changing their legal status as non-binding recommendations concerning the responsibilities of corporate citizens. The proposed text provides that all Contracting Parties should be invited to participate in future OECD work on the Guidelines. However, the issue of follow-up procedures and other questions remain under consideration.

The MAI should be compatible with other international agreements, including the IMF and WTO, and should not create obligations on Parties that conflict with their obligations under those agreements.

Implementation and Operation

A Preparatory Group comprised of Signatories to the Final Act and Signatories to the agreement, will prepare for ratification and undertake other duties specified in the Final Act. After entry into force, a Parties Group will be responsible for the operation of the agreement. As a general rule, decisions will be taken by consensus. Views diverge on whether a different voting rule is necessary in certain cases.

Accession

The MAI will be open to accession by non-OECD Member countries that are willing and able to meet its obligations. Negotiators will pursue intensified dialogue with non-Member countries, particularly those interested in acceding to the MAI. Non-Member countries will be able to negotiate the conditions of their accession and in particular their country specific reservations.