



Negotiating Group on the Multilateral Agreement on Investment (MAI)

MULTILATERAL AGREEMENT ON INVESTMENT

(Report by the Chairman of the Negotiating Group)

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1. In 1995, OECD Ministers launched negotiations on a multilateral agreement on investment (MAI) with high standards of liberalisation and investment protection, with effective dispute settlement procedures, and open to non-Members. Significant progress towards this goal has been achieved, but it will not be possible to conclude the negotiations as scheduled by the meeting of the Council at Ministerial level in April 1998. Member countries are committed to find solutions to the outstanding issues and to conclude an agreement as soon as possible.

2. After three years of intensive discussion and negotiation, texts are available on most of the essential elements of the agreement.¹ Many of these elements are inspired by bilateral investment treaties and other international economic agreements. While policy choices are still needed in some cases, these elements include:

- a broad, asset-based definition of investment covering foreign direct investment portfolio investment and other financial investments, and intangible assets, but excluding cross-border trade in services, with MAI disciplines designed to apply to all economic sectors and at all levels of government in the context of a satisfactory scope and balance of commitments,
- non-discriminatory treatment of investors and investments through national treatment and most-favoured nation treatment, and rules on transparency;
- additional disciplines, including provisions on performance requirements, privatisation, monopolies, and key personnel,
- expropriation and other investment protection provisions,
- a framework for exceptions to MAI disciplines that increases transparency and takes account of economic concerns and political, social and cultural sensitivities,
- elements of a dispute settlement mechanism for state-state and investor-state disputes,
- proposals to address labour and environment issues,
- annexation of the OECD Guidelines for Multinational Enterprises,
- institutional arrangements, including a Parties Group, and accession of non-Members.

3. The past year has concentrated on exploring solutions to the main political issues. Broad though not unanimous support has emerged for key elements to address labour and environmental issues. The treatment of intellectual property in the MAI, including literary and artistic works, needs to be determined. Discussion also focused on exceptions with respect to national security, public order, measures taken in the context of a regional economic integration organisation, culture, subsidies, health, social services, and aboriginal and minority issues. In considering proposed exceptions, delegations agreed to be guided by

1. The main features of the MAI have been summarised in the Note by the Chairman submitted on the occasion of the High Level Meeting on 16-17 February, [DAFFE/MAI(98)4].

the need to preserve the quality of the agreement and to achieve a satisfactory balance of rights and obligations among the Parties. Compatibility with international agreements, including the WTO, the IMF and multilateral environmental agreements, will be assured.

4. The High Level Meeting in February 1998, confirmed the fundamental importance of an effective dispute settlement mechanism in the MAI. There is strong support for both the state-state and investor-state modes of dispute settlement provided for in the agreement although some issues are still outstanding. A few delegations have concerns particularly in the area of investor-state dispute settlement including its application to the pre-establishment phase of investment.

5. At the High Level Meeting, delegates further discussed the issues arising from conflicting requirements, secondary investment boycotts and illegal expropriations. A solution for these issues seems necessary to ensure a successful outcome of the MAI negotiations.

6. The MAI has also to reflect the economic reality that many more non-Member countries are becoming important players in foreign investment, both as importers and exporters of capital. It will be open to those that, like OECD Members, see it as in their interests to adhere to a common regime of investment rules. Member countries have made considerable efforts to inform non-Members on the progress of negotiations.² Five non-Members -- Argentina, Brazil, Chile, Hong Kong and the Slovak Republic -- now participate fully as Observers to the Negotiating Group. The three Baltic countries -- Estonia, Latvia, Lithuania -- have now also been invited as Observers. The Negotiating Group is considering to recommend to the Council that these countries be admitted as full participants to the negotiating process.

7. The MAI is now the centre of heightened public scrutiny as part of a broader debate about the implications of globalisation. Consultations with non-governmental groups as well as with business and labour representatives need to continue. A key objective of the MAI is to provide a comprehensive legal framework for the treatment of foreign investment. Subject to international law and to international agreements to which it has subscribed, every state reserves the right to prescribe the conditions under which all investors operate within its national jurisdiction. The MAI would not inhibit the normal non-discriminatory exercise of regulatory powers by governments and such exercise of regulatory powers would not amount to expropriation.

8. There is strong support to continue the negotiating process with a view to concluding the MAI at the earliest possible date. Member countries also recognise the importance of the public debate and are committed to an active public discussion on the issues at stake in the negotiations.

9. Ministers are invited to adopt the draft Ministerial Statement on the MAI [DAFFE/MAI(98)14/FINAL] which has been prepared by the Negotiating Group.

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