De-Fanging the MAI

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Introduction

A Dutch bank merging with a German bank, Japanese timber companies logging forests in Canada, and U.S. mutual funds acquiring shares of South Korean companies— all are forms of foreign investment, which involves the international movement of money and the expansion of corporations that link the world into an increasingly global economy. Every year, billion-dollar investments draw these links closer. These investments affect people's lives, work experience, and the natural environment.

While each nation regulates foreign investments according to its own societal needs, foreign investors generally prefer a uniform international regulation of investments instead of facing incongruous national treatments. Currently, there are only a few uniform international rules on how governments can regulate foreign corporations. The Multilateral Agreement on Investment1 (MAI) may soon fill in this void.

Since 1995, the twenty-nine governments of the Organisation for Economic Cooperation and Development (OECD) have been negotiating the MAI. If completed, membership will be open to all nations. Developing countries that did not participate in the MAI negotiation may feel compelled to sign the MAI. When competing for foreign investments, developing nations may view the MAI as a "seal of approval" that would attract foreign corporations.

The MAI would change the existing balance of power between governments and their citizens on the one hand and large multinational corporate investors on the other. Under the MAI, these corporations will receive new legal privileges that are designed to deter governments from enacting laws that would interfere with investments. The MAI would allow foreign investors to sue governments for monetary damages in special international corporate courts. The MAI would also give foreign investors the power to:

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— invest and operate under terms that are equal to, and sometimes better than, those enjoyed by local companies;
— operate free of performance requirements, such as requirements to take a local partner, hire a minimum number of employees, or transfer technology;
— freely transfer money in and out of a country;
— be compensated when a government takes the investor’s assets, both when property is actually expropriated and when regulations have the “equivalent effect”\(^2\) of taking assets; and
— enjoy the MAI’s rules for a minimum of twenty years, even if a country withdraws from the agreement.

The MAI, however, does not require investors to operate in an environmentally or socially responsible manner. Citizens of countries that sign the MAI are not given rights to monitor foreign investments or hold investors accountable.

This Article analyzes many of the MAI’s provisions and identifies areas of concern. Where appropriate, this Article offers suggestions for textual changes. Part I of this Article discusses the scope and application of the MAI. Specifically, this Part examines the MAI’s broad definition of the term “investment” and its adverse economic implications. Part II addresses the relationship between host nations and foreign investors under the MAI. This part pays particular attention to how the host nations may be required to treat foreign investors more favorably than domestic investors. Part III looks at the MAI’s attempt to protect foreign investments and the collateral problems that this protection may cause in the host nation. Part IV critiques the MAI’s dispute resolution procedures and offers suggestions to minimize the loopholes.

I. Scope and Application

A. Definition of Investment

The MAI defines the term “investment” too broadly. By covering “[e]very kind of asset,”\(^3\) the definition extends beyond direct investment and includes such forms of investment as portfolio investment, intellectual property rights, and concession rights. These forms of non-direct investment raise a series of policy concerns. The MAI is not the correct forum for resolving these concerns and should focus exclusively on direct investments.

By covering investments that are indirectly controlled by a signatory nation, the MAI extends its benefits to investors from non-member countries. According to MAI’s commentary, there is wide support for covering an “investment by an investor established in another MAI Party, but owned

\(^2\) Id. art. IV(2.1).
\(^3\) Id. art. II (Definitions) (2).
or controlled by a non-MAI investor." This provision may encourage investors from non-MAI nations to set up shell corporations in MAI member countries to take advantage of MAI benefits.

Likewise, there is wide support to define the term "investment" to include investments "by an investor established in a non-MAI Party, but owned or controlled by an investor of a third MAI Party." This definition would enable investors from non-MAI nations to enjoy MAI benefits simply by forming joint ventures with investors from MAI member countries. This broad interpretation of the term "investment" will enable almost any corporation to benefit from, and have legal standing under, the MAI. Accordingly, the definition of investment should exclude indirect investments made by investors from non-MAI countries, given that non-member nations are not bound by the MAI's environmental, labor, or corporate obligations.

1. Portfolio Investments

The inclusion of portfolio investment raises particular concerns. The MAI's broad definitions do not distinguish between foreign direct investment and portfolio investment. Direct investment and portfolio investment have distinctive characteristics and require different regulations. Direct investors acquire significant percentages of a company to gain managerial control. Portfolio investment, on the other hand, is a passive strategy by which the investor purchases equities (stocks and bonds) as part of an investment portfolio. Portfolio investors do not control or manage the companies they invest in. Rather, they provide capital in exchange for dividends, interests, and a possible increase in share price. This lack of commitment to any economic activity makes portfolio investment more liquid and volatile than direct investment.

Portfolio investment in developing countries is a recent phenomenon. Non-existent in the early 1980s, annual flows of portfolio equity to the developing world have risen from around $3 billion in 1990 to $40 billion in 1996. Since 1989, sixty new stock markets have opened around the world. Developing countries seek capital infusion by opening their markets to foreign investors. From 1991 to 1994, the percentage of emerging stock markets classified by the World Bank as giving "free entry" to foreign investors rose from twenty-six percent to fifty-eight percent. The lure of emerging markets is evidenced by the explosive growth of emerging market funds "from $1.9 billion in 1986 to $10.3 billion in 1989 to $132 billion by

5. Id. art. II(Definitions)(Investment)(2)(c).
8. WORLD BANK, PRIVATE CAPITAL FLOWS TO DEVELOPING COUNTRIES: THE ROAD TO FINANCIAL INTEGRATION 102 (1997).
the middle of 1996."

The MAI should not define investment to include these short-term and speculative investments. Speculative portfolio investments can have disruptive economic and social effects, particularly in emerging markets. One way to avoid speculation would be to set a minimum time frame, of one or two years, before the MAI would cover such investments. To enjoy the MAI's protection, foreign investors would have to maintain their investments in a country for more than the requisite duration.

2. Intellectual Property Rights

International legal protections of Intellectual Property Rights (IPRs) raise many social and environmental concerns. These concerns touch upon issues such as genetic engineering, biodiversity, patents, transfer of environmental technology, and plant-based drugs. Moreover, investors could use goodwill and business reputation, as components of IPRs, to challenge government statements and legislative debates on these issues. It is doubtful that the MAI negotiations can fully account for these complex issues. The MAI's definition of investment should therefore exclude IPRs.

3. Concession Rights

Concessions, licenses, and permits for the development and exploitation of natural resources often involve national and local management of natural resources. At times, a government may need to restrict an investor's access to resources as a means of conservation or to favor its citizens when exploitation rights are granted. The MAI's definition of investment should thus exclude natural resources concessions.

B. Geographical Scope of Application

Given the sensitivity of marine ecosystems, the threats posed by off-shore economic activity, and worldwide depletion of marine resources, the MAI should only apply to a nation's land territories by default. The MAI should apply to territorial seas, archipelagic waters, and other maritime areas only if contracting parties expressly agree to extend the MAI's coverage.

Applying the MAI beyond land territories could conflict with the rights of states under the UN Convention on the Law of the Sea (LOS Convention), which deals with almost all areas of ocean use. The LOS Convention is instrumental in maintaining international peace and security. Fisheries disputes are often historically and politically charged. These disputes have become increasingly common as a result of the severe decline in world fish stocks. The Convention helps to resolve many complex, and often bitter, ocean resource disputes.

9. Id. at 16.
10. These include, for example, fishing rights, timber concessions, and mining concessions.
The MAI could conflict with important fishery rights that the LOS Convention confers upon coastal states. Coastal states have sovereign rights for conserving and managing all natural resources in their exclusive economic zones (EEZs). Each coastal state determines its catch capacity but has to make the surplus available to other states. The Convention takes into account the special needs of land-locked, geographically disadvantaged, and developing states in the region. Foreign nationals fishing in the EEZ must comply with the coastal state's laws and regulations. These measures often involve nationality-based discrimination, thereby conflicting with the MAI's national treatment provision and its prohibition on performance requirements.

C. Application to Overseas Territories
Territories are typically islands with small economies and ecosystems. Given their small size, large scale foreign investments can have a tremendous impact on these territories. The MAI should therefore require contracting parties to obtain the consent of territorial residents through a decision of a representative body or a referendum.

II. Treatment of Investors
A. National Treatment
One of the main standards of the MAI is "national treatment," which requires countries to treat foreign investors the same as local investors. National treatment, along with the corollary principle of most favored nation treatment, form the bedrock principles of economic integration in international law. Unlike most of the bilateral investment treaties (BITs), the MAI requires governments to provide national treatment during the market entry phase of foreign investment. Whereas the vast majority of BITs apply national treatment only after an investor has gained market access. This transforms the MAI into a top-down agreement, essentially eliminating national borders for the purposes of investment.

1. Environmental Concerns
National treatment may make it more difficult to combat environmental degradation. A nation may wish to impose different obligations on foreign investors to minimize environmental harms. Some countries limit invest-

12. Id. art. 56:1.
13. Id. art. 62:2.
14. Id. art. 62:3.
15. Id. art. 62:4.
16. Discussed infra in Part IIA of this Article.
17. Discussed infra in Part IIB of this Article.
18. See generally MAI Negotiating Text, supra note 1, art. III(National Treatment and Most Favoured Nation Treatment)(1)-(3).
19. Id.
20. For example, the host nation may wish to prevent the foreign investor from practicing cut-and-run investments in its timber industry.
ments in the toxic waste disposal industry to domestic companies. They fear that, if a foreign investor owns a waste facility, it could be difficult for the host country to keep toxins produced abroad from being imported into the country without violating the foreign investor's rights to trade with subsidiaries.

The MAI might interfere with efforts to reorient the world's economy in a more environmentally friendly direction. To achieve a sustainable environment, nations must consume natural resources at a rate that is below the earth's carrying capacity. The MAI's open access regime would allow rich countries to live beyond their borders, consuming more than their share of land, wood, minerals, and other resources. Because breaking this cycle will require more controls on international investment, the MAI's liberal approach to international investment is undesirable from an ecological point of view.

2. Cultural Concerns

Countries that are in favor of a cultural carve-out of national treatment claim that there are some realms of human activity that one cannot entrust to market forces. Many OECD members have claimed country-specific reservations for print and broadcast media, as well as for programs that preserve the cultural heritages of indigenous peoples. The MAI's national treatment clause, as presently drafted, would require nations to open up their cultural sectors to unfettered foreign competition. The MAI requires the host nation to grant foreign investors "treatment no less favorable" than those given to domestic firms. This requirement hampers the host nation's ability to protect its cultural industries.

To ameliorate the aforementioned problems, this Article suggests the following amendments:

- To bring the national treatment language in line with the MAI's non-binding treatment of investor obligations and environmental safeguards, "shall" should be replaced with "should" or with "shall endeavor to" in the MAI's section on national treatment.
- The national treatment standard should be changed to encourage equal treatment of foreign investors without promoting their preferential treatment. Therefore, the "no less favorable" requirement should be changed to a standard of "no less favorable or no more favorable."
- The phrase "in like circumstances" should be retained as a qualifier to the national treatment obligation, accompanied by explanatory lan-

21. See MAI Negotiating Text, supra note 1, annex 1(Culture).
22. As of February 16, 1998, Australia, Austria, the Czech Republic, Italy, South Korea, the Netherlands, New Zealand, Poland, Spain, Switzerland, Turkey, and the United States have submitted country specific reservations for cultural industries or programs.
23. MAI Negotiating Text, supra note 1, art. III(National Treatment and Most Favoured Nation Treatment)(1).
24. Id.
25. Id.
26. Id.
guage clarifying that differential effects of regulations do not translate to a violation of national treatment.

- Of the list of activities to which national treatment applies, the terms "acquisition"\(^{27}\) and "sale or other disposition"\(^{28}\) raise particular issues of absentee ownership, differential scale of foreign investment, and other sensitive issues. These two terms should be excluded from the national treatment requirement, which should be limited to equivalent treatment of investors' operations.

B. Performance Requirements

The performance requirement section\(^ {29}\) illustrates how the MAI might give foreign companies better than equal treatment. Under the MAI, governments cannot require foreign corporations to meet certain performance requirements or conditions, even if these conditions are imposed on local companies.\(^ {30}\) Prohibited performance requirements include requiring corporations to take on a local partner, to hire a certain number of local people, or to transfer environmentally beneficial technology to the government or local companies.

Performance requirements are important economic development tools for industrialized and developing nations alike. They are the kinds of policies that can ensure that communities benefit directly from foreign investment. Accordingly, the performance requirement section should be amended as follows:

- Given the non-binding nature of the MAI's provisions on environmental protection and investor behavior, paragraph 1 should read "A Contracting Party should not (or shall endeavor to)."

- The section should not apply to investors of "a non-Contracting party,"\(^ {31}\) whose government and investors are not bound by any of the MAI's rules on the environment, labor, or investor behavior.

- The section should only apply to requirements imposed by legislation, not to any "commitment or undertaking."\(^ {32}\) The MAI should not unduly alter the balance of bargaining power between governments and investors by barring performance requirements agreed upon as part of an overall contractual relationship.

- Alternatively, if the above changes were not to be made, performance requirements should be optional for developing countries that wish to accede and only be subject to most favored nation obligations.

The following categories of performance requirements are particularly sensitive and should therefore be excluded from the ban as priority amendments:

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\(^{27}\) Id.

\(^{28}\) Id.

\(^{29}\) See generally id. art. III (Performance Requirements)(1)-(5).

\(^{30}\) Id.

\(^{31}\) Id. art. III(Performance Requirements)(1).

\(^{32}\) Id.
From an environmental point of view, banning technology transfer could deprive developing countries of access to clean and new technology. The international community has developed in the last thirty years a consensus on the critical role that technology transfer plays in sustainable development. MAI provisions will reduce the bargaining power of developing countries to encourage technology transfer on favorable terms and will ultimately harm current efforts towards sustainable development.

Employment of Local Personnel. It is especially inappropriate for the MAI to restrict local hiring requirements.

Joint Ventures and Minimum Local Equity Participation. Both types of requirements can help limit the negative effects of absentee ownership by ensuring local participation in management and profit-sharing with the community.

Additionally, this Article offers the following recommended changes to the section on the environmental exception to performance requirements:

- The phrase "Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on investment" should be removed from the environmental exception to the MAI's ban on domestic content requirements and local purchasing requirements. This language would allow excessive scrutiny.
- The phrase "necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement," should be removed. It could be interpreted as being the equivalent of a "least investment restrictive" test, thereby undercutting the government's ability to protect the environment based on its own judgment and priorities.

C. Privatization

Privatization involves the sale of public assets or functions to private investors. Governments privatize to raise money or because they think some state-owned enterprises would run more efficiently if they were privately-owned. Privatization is big business, with global sales of government enterprises approaching $100 billion annually.

In today's global economy, purchasing privatized enterprises is a key avenue of expansion for multinational corporations. A significant portion of privatization deals involve foreign investors. Forty-two percent of assets privatized in developing nations from 1988-1994 were purchased by for-
From 1989 to 1993, privatization deals accounted for seventeen percent of foreign direct investment in Latin America, sixty percent in Central and Eastern Europe, but only two percent in East Asia.42

The decision of whether or how to privatize is politically sensitive and often controversial. Given that the impacts of privatization can vary from case to case, governments should retain maximum flexibility when devising privatization plans. Some countries privatize public assets through methods that give workers and management or the general public the first opportunity to buy stock to broaden ownership and share profits widely. Common methods of ensuring wide ownership of privatized companies include: (1) reserved shares for the public and small investors; (2) employee or management buyout schemes, whereby workers and management at state enterprises are sometimes given the first opportunity to raise the money to buy a privatized company or factory; and (3) retention of a "golden share," whereby governments, having gone through a detailed process to find the right buyer, keep the right to veto a subsequent sale of the company to an inappropriate purchaser.

Governments should retain the right to privatize public assets in ways that protect the public interest. This flexibility not only achieves goals of social justice, but also allows smoother economic transition and can be critical in creating public acceptance of privatization processes. The MAI should not restrict privatization mechanisms that seek to guarantee broad distribution of ownership. For this reason, the MAI should adopt rules that combine paragraph 1(a) on voucher schemes and alternatives 1 and 4 of paragraph 3 on special share arrangements.43 In addition, the MAI's rules on privatization should not apply to "subsequent transactions involving a privatized asset."44

III. Investment Protection

A. General Treatment

The general treatment provisions45 could be subject to abuse because they are so general and broad. The phrases "fair and equitable treatment"46 and "full and constant protection and security"47 either duplicate the MAI's specific provisions on treatment and protection or create an open-ended set of new rights for foreign investors. In either case, the phrases should be eliminated.

The requirement for "treatment no less favorable than required by international law"48 should also be eliminated. The use of the words

41. WORLD BANK, supra note 8, at 102.
42. UNITED NATIONS CENTER ON TRADE AND DEVELOPMENT (UNCTAD), WORLD INVESTMENT REPORT 18 (1995).
43. See MAI Negotiating Text, supra note 1, art. III(Privatisation)(1), (3).
44. Id. art. III(Privatisation)(1)(b).
45. See generally id. art. IV(1)-(7).
46. Id. art. IV(1.1).
47. Id.
48. Id.
“international law” without further explanation could be interpreted as referring to other international agreements that set standards but lack investor-state dispute resolution. If so, the MAI could become a means of private enforcement of a wide range of international legal principles and instruments. In the event that these general treatment standards are retained, the following changes should be made:

- Change “shall” to “should” or “shall endeavor to.”
- Add “as defined by the provisions of this agreement” at the end of the first sentence.
- Define “international law” through a closed list of specific international legal principles relating to foreign investment.

The second standard on “unreasonable or discriminatory” treatment is an open door for deregulatory efforts. This standard should be removed from the MAI. In the event that it is retained, “shall” should be changed to “should” or “shall endeavor,” and “unreasonable” should be eliminated.

B. Expropriation and Compensation

1. Expropriation

Under the MAI, governments that expropriate an investor’s property must pay the market price of the property in return. However, problems arise with terms like “indirect” expropriation and “measures having the equivalent effect” of expropriation. For example, in the United States, there is a lack of consensus on the application and scope of “regulatory takings,” a U.S. term for expropriation, with respect to environmental regulations. The MAI’s broad definition of expropriation, which includes indirect expropriation, might permit foreign investors to challenge U.S. environmental regulations.

To reduce the risk that the MAI expropriation section will be interpreted as including “regulatory takings,” this Article offers the following suggestions:

- Change “expropriate or nationalize directly or indirectly... or take any measure or measures having equivalent effect” to “expropriate or nationalize directly.”
- Clarify that regulations affecting an investor’s use of its investment are not direct expropriations unless the regulations take ownership or control away from the investor or leave an investor with no use for the investment.
- Add the language from the section on taxation, which reads: “A measure would not be expropriatory if it was in force and was transparent when the investment was undertaken.”

49. Id. art. IV(1.2).
50. See id. art. IV(2.1).
51. Id.
52. Id.
53. Id. art. VIII(2), n.3(c).
Add language stating that expropriation provisions shall not protect foreign investment’s dictatorial regimes when successive democratic governments regulate or redistribute state assets.

2. Compensation

Compensation for expropriation should not take precedence over financial liabilities owed by an investor to a contracting party. To prevent an investor from claiming expropriation as a means of avoiding liabilities, no claim of expropriation should be accepted under the MAI until the investor has met all the obligations required by the laws of the host nation.

C. Transfers

Long-term foreign investments contribute to the host nation’s stable economic growth. Short-term capital speculations, on the other hand, could destabilize the host nation’s economy. The MAI gives foreign investors the right to freely enter markets, buy short-term portfolio investments, and withdraw their money. This combination restricts the host country’s ability to deal with speculative investments, whereby foreign money can pour into a hot market, then quickly pull out when the economy cools down.

The recent economic crisis in Asia demonstrates the risks of rapid and unstable foreign capital transfers. Many economists and policy-makers have called for more regulation of capital flows to reduce the risks of economic destabilization. However, the MAI prevents countries from adopting and implementing strategies that prevent capital flight. Specifically, the MAI prohibits host nations from imposing limits on currency convertibility and imposing “speed bumps” to encourage long-term investments.

In addition, the MAI could bar the use of certain strategies designed to limit inflows of foreign investment. Specifically, the MAI could prevent the host nation from: (1) imposing a ceiling on foreign borrowing by domestic banks; (2) imposing a reserve requirement for portfolio investment; (3) withholding government-subsidized insurance for the bank deposits of foreign investors; (4) requiring administrative permission for a foreign bond issue and imposing minimum maturity periods for foreign bond issues; and (5) imposing a less favorable exchange rate on the capital transactions of foreign investors.

To minimize the dangers of destabilizing capital flights, this Article proposes the following changes to the transfer provision:

— Change “shall ensure” to “should ensure” or “shall endeavor to ensure.”

54. See id. art. IV(4.2).
55. See id. art. III(National Treatment and Most Favoured Nation Treatment)(1).
56. See id.
57. See id.
58. See id.
59. See id.
60. See id. art. IV(4).
61. Id. art. IV(4.1).
Remove the word "freely" from the phrase "may be freely transferred into and out of its territory without delay."  
Remove "without delay" from the phrase cited above.

Eliminate category "a" — initial capital and additional amounts to maintain/increase investment. Payments of capital raise concerns both for inwards and outwards transfers (disinvestment). Governments should be able to condition and control disinvestment. Excessive inward transfers can be a source of financial instability. Capital controls on inflows are common policy tools and they should not be affected by the MAI.

Eliminate category "b" — returns. A common criticism of some forms of absentee ownership is insufficient reinvestment of profits and other returns in the host community. Communities may seek to require reinvestment of a portion of returns as a protective measure, in which case the MAI should not create a special exemption for foreign investors.

VI. Dispute Settlement

A. State-State Procedures

The MAI's dispute resolution process does not permit private citizens to dispute cases, nor does it allow private citizens or their governments to use the MAI's dispute procedures to sue foreign investors. The MAI's dispute resolution process is one sided: it only enforces an investor's interests.

The MAI modeled its state-to-state dispute procedures after those of the World Trade Organization (WTO). The experience at the WTO indicates a structural bias against environmental conservation laws of individual nations. In each of the disputes involving national regulation of the environment or natural resources, the WTO Dispute Settlement Body (DSB) has ruled against national regulations. To reduce such a bias, this Article recommends the following amendments to the MAI's dispute resolution mechanism.

1. Consultations

Requests to the party group to consider a dispute, and recommendations made by the party group to the contracting parties in disputes, should be made publicly available. Written factual representations produced during consultations should also be made publicly available. Any mutually agreed-upon solution to consultations should be made public at the time that the parties group is informed of the solution.

2. Arbitration

The MAI provides that parties may not initiate proceedings for a dispute that its investor has submitted to arbitration. From the point of view of

62. Id.
63. Id. art. IV(4.1)(a).
64. Id. art. IV(4.1)(b).
65. See id. art. V(C)(1)(b).
ensuring that the public interest is represented in dispute proceedings, state-state disputes are preferable to investor-state disputes. If investor-state arbitration is allowed under the MAI, paragraph b. should read:

A Contracting Party may initiate proceedings under this article for a dispute which its investor has submitted, or consented to submit, to arbitration under Article D, at any time up until a final award is rendered in the investor-state dispute. The investor-state dispute shall be put on hold in such a case, and the claim of the investor extinguished if an award is granted in the state-state proceeding.

3. Transparency

Secrecy in decision-making undermines public confidence in and support for decisions. Any MAI decision-making process should be open and transparent. All persons making submissions in connection with a dispute, including the parties to a dispute and any experts selected by the dispute settlement panel, should be required to make available to the public copies of all their reports and submissions. Such public copies should be made available at the same time as the official MAI submissions.

General provision A.2 on confidential and proprietary information can be interpreted to allow the suppression of important environmental or social information. The terms “confidential” and “proprietary” are not defined. Moreover, the phrase “and which is designated as such by the Party providing the information” could be interpreted to mean that anything designated as confidential will be considered confidential. The MAI’s dispute system should provide open access to information. Public copies should be redacted only if, and to the extent that, they contain information that warrants confidential treatment because it fits within clearly and narrowly defined exceptions to the disclosure presumption. These categories and their precise definitions should be determined in advance through an open and transparent decision-making process.

Panel decisions, both preliminary and final, should be made available to the public at the same time they are released to the disputants. Official translations should be issued as soon as possible. Hearings before dispute settlement panels and before the appellate body should be open to the public, unless a request is made by a party for in camera treatment of certain portions of the proceeding.

4. Public Participation

The MAI’s dispute resolution system should recognize the right of civil society as a whole, and not just those of the member states of the MAI, to participate in the dispute settlement process. Arbitral panels should encourage and accept amicus curiae briefs from the public in dispute settlement proceedings. This is particularly important in the case of disputes involving complex, technical, or politically sensitive issues. Upon request,
the dispute settlement panels and appellate body should permit oral presentations of the amicus curiae briefs.

The MAI should create a mechanism by which the dispute settlement panels can adequately consider the views of all parties. Dispute settlement panels should have adequate staff and support to analyze the facts and the legal positions. MAI member states should also provide legal services to member states and other interested parties who lack expertise in MAI rules or the resources to hire outside counsel. This could be done by maintaining a list of competent counsel, experienced organizations, or other persons willing to provide legal services for little or no remuneration. Member states should also provide intervenor funding to enable public interest groups from less developed countries to express their positions to the MAI dispute settlement.

5. Technical Competence

Many issues, particularly in the area of environmental regulation, are beyond the technical competence of international arbitral bodies. To ameliorate this problem, MAI arbitral panels should seek advisory opinions from other fora of competent jurisdiction, such as the International Court of Justice. The MAI should also establish a procedure whereby complex disputes are referred to another body of competent jurisdiction.

6. Deference to National Sovereigns

When appropriate, the MAI should defer to the laws and regulations of member states. To this end, the burden of proof in MAI disputes should weigh heavily on the party seeking to overturn an environmental or social law or regulation adopted by a member state. Also, the MAI should provide a standard of review in dispute settlement proceedings that accords deference to national decisionmakers.

B. Investor-State Procedures

The MAI’s investor-state dispute resolution procedures gives investors the right to sue governments in a variety of international tribunals. Investors decide when, where, and whether to challenge laws or policies in international court. There is no governmental mechanism in place to screen investor claims. The MAI does not set out the standards to be employed by dispute panelists when adjudicating a case. Thus, the potential impacts of this dispute resolution process are ambiguous.

The MAI lists three venues for investors to file a claim against a government. The first venue, the International Centre for Settlement of Investment Disputes (ICSID), is part of the World Bank. Nations must be a member of the ICSID Convention to use the facility. Alternatively, if an MAI signatory nation is not a member of the ICSID, it may use the other

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68. See id. art. V(D)(2).
69. See id. art. V(D)(3)(a).
70. See id. art. V(D)(2)(c)(i).