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# Towards a Multilateral Agreement on Investment

Dr. Rainer Geiger\*

## Introduction

In May 1995, the Paris-based Organisation for Economic Co-operation and Development (OECD) launched negotiations for a Multilateral Agreement on Investment (MAI). These negotiations were unprecedented in scale. For the first time a group of countries accounting for the bulk of international investment sought to develop a comprehensive set of rules on investment liberalization, investment protection, and dispute settlement.<sup>1</sup> The MAI negotiations have generated enormous public debate on the impact of foreign investment and the challenges of globalization. To provide a more thorough discussion of outstanding issues of the MAI, the OECD Council of Ministers announced on April 28, 1998, "a period of assessment and further consultation between the negotiating parties and with interested parts of their societies."<sup>2</sup>

This Article discusses the rationale and objectives of the MAI and responds to concerns raised in public debate.

## I. Rationale and Objectives of the MAI

Since the 1960s, rapid expansion of international investment has accompanied slow but steady progress in the development of an international framework of rules for investment.<sup>3</sup> The OECD played a pioneering role in this development. The OECD's Codes of Liberalisation of Capital Movements and Current Invisible Operations (Capital Movement Codes) paved the way to the removal of capital account controls and other obstacles to

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1. Most foreign direct investment (FDI) is still occurring in the OECD area. Only a very small percent of total world capitalization exists in the developing countries and emerging markets, while a majority of global FDI has gone to industrialized countries. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), FOREIGN DIRECT INVESTMENT AND ECONOMIC DEVELOPMENT: LESSONS FROM SIX EMERGING ECONOMIES (1998).

2. OECD, *Ministerial Statement on the Multilateral Agreement on Investment (MAI)* (Apr. 28, 1998) <[http://www.oecd.org/news\\_and\\_events/release/nw98-50a.html](http://www.oecd.org/news_and_events/release/nw98-50a.html)> [hereinafter *Ministerial Statement*].

3. For an overview of developments in the international law on investment, see R. GEIGER, UN CADRE MULTILATÉRAL DE L'INVESTISSEMENT, LE RÔLE DE L'ÉTAT DANS LE DÉVELOPPEMENT DE L'ÉCONOMIE 552 (1997).

31 CORNELL INT'L L.J. 467 (1998)

international services transactions.<sup>4</sup> The Capital Movement Codes were supplemented in 1976 by the Declaration on International Investment and Multinational Enterprises, a modification that balanced national treatment of foreign controlled enterprises on the one hand, and standards for investor behavior on the other.<sup>5</sup> In 1983, the OECD Capital Movements Code was further amended to provide foreign investors the right of establishment in Member countries. By 1995, almost all exchange controls on capital accounts and most horizontal restrictions on foreign investment (i.e. authorization procedures for all categories and sectors) had disappeared within OECD member countries.

During the mid-1970s, the Conference on International Economic Cooperation (CIEC) recognized the need for an open investment climate based on transparent, stable, and equitable rules. Eight developed and nineteen developing countries (the European Community member countries were represented by a single delegation)<sup>6</sup> participated in the CIEC from December 1975 to June 1977.<sup>7</sup> The principles recognized by the CIEC were developed in greater detail in the 1992 World Bank Guidelines on Treatment of International Investment, which received universal recognition.<sup>8</sup>

Around the same time, a dense network of bilateral investment protection agreements had developed among industrialized countries and developing countries. Several initiatives used a regional approach: the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT) succeeded in setting high standards for the treatment of foreign investment.<sup>9</sup> A global approach was also adopted: the General Agreement on Trade in Services (GATS), which entered into force on January 1, 1995, as part of the World Trade Organization (WTO) agreements, covered investment as international services transactions.<sup>10</sup>

Building on these achievements, the proposed MAI seeks to consolidate and to innovate. The MAI will consolidate all disciplines relating to international investment and effective dispute settlement. It will innovate by introducing new disciplines and integrating labor, environmental, and other societal concerns into the agreement.

Thus, the MAI is conceived to be:

- *state-of-the art*: building on the highest standards of treatment contained in current bilateral, regional and sectoral agreements;

4. See OECD, *Introduction to the OECD Codes of Liberalisation* (July 3, 1998) <<http://www.oecd.org/daf/cm/codes/codes.htm>>.

5. OECD, *OECD Declaration on International Investment and Multinational Enterprises* (July 3, 1998) <<http://www.oecd.org/daf/cm/codes/declarat.htm>>.

6. See THE ATLANTIC INSTITUTE FOR INTERNATIONAL AFFAIRS, EUROPE AND THE NORTH-SOUTH DIALOGUE 74-78 (Wolfgang Wessels ed., 1978).

7. See *id.*

8. See *Foreign Investment Law Journal*, vol. 7/2, 1992, ICSID, Washington, D.C.

9. See LEGAL COUNSEL, INTERNATIONAL ENERGY AGENCY, THE ENERGY CHARTER TREATY 16-18 (1995).

10. For a detailed analysis, see URSULA KNAPP, THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS): AN ANALYSIS 7-8 (OECD Working Papers No. 85, 1994).

- *comprehensive*: covering all categories of investment (direct as well as portfolio), all sectors and activities of enterprises, all phases of the investment process (before and after establishment, privatization, and de-monopolization), and applying obligations to all levels of government (federal, provincial, regional, and local);

- *evolutionary*: setting a framework for progressive liberalization while respecting the regulatory authority of signatory countries and protecting important national interests;

- *balanced*: recognizing societal interests such as labor standards and environmental protection, and highlighting the responsibilities of multinational enterprises to behave as good corporate citizens in their host countries;

- *open*: developing a free-standing international treaty open to all countries willing and able to assume its obligations.

These principles are reflected in the key provisions of the draft agreement.<sup>11</sup>

## II. Key Elements of the MAI

### A. Progressive Liberalization

The MAI is aimed at promoting an open international investment climate, removing obstacles to the crossborder flow of capital, and facilitating the establishment of enterprises. The key disciplines are national treatment, most favored nation (MFN) treatment, and transparency.

National treatment means that foreign controlled enterprises can expect, in like circumstances, treatment no less favorable than that accorded to domestic investors. This implies equality of competitive conditions for foreign enterprises already established in the country and access to investment opportunities for non-resident enterprises. The MFN treatment safeguards the multilateral character of the agreement. As a matter of principle, preferential regimes among participating countries or reciprocity requirements based on a bilateral exchange of concessions are contrary to this principle. Transparency means that rules, regulations, and administrative practices applying to investment and business activities in the country should be clear, predictable, and published.

The MAI aims to avoid discrimination. It does not intend to create uniform investment conditions in participating countries. Each member remains free to determine the conditions under which business can be conducted in its territory. Multinational, as well as domestic, enterprises are subject to the laws and jurisdiction of the countries in which they operate. To avoid misunderstandings, the regulatory sovereignty of participating countries is explicitly stated in the Ministerial Declaration of April 28, 1998.<sup>12</sup>

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11. The consolidated text of the MAI is available at <<http://www.oecd.org/daf/cmis/mainindex.htm>>.

12. Ministers confirm that the MAI must be consistent with the sovereign responsibility of governments to conduct domestic policies. The MAI would

National treatment and MFN are comparative standards: they apply in like situations. Thus, the special circumstances of each investment are taken into account. This means, for instance, that countries are not expected to extend programs designed to promote small and medium sized enterprises or regional development to big multinational enterprises that do not meet the criteria of these programs.

The MAI will not require the instantaneous dismantling of non-conforming measures, but will allow for general or country-specific exceptions. General exceptions will apply to cover measures taken for essential national security interests. The MAI will likely contain a general exception for public order, subject to control for abuse. Generic solutions will also apply in areas where concerns are shared by the vast majority of participating countries. Thus, prudential measures taken to maintain the stability of the financial system will be considered to be in conformity with the MAI. Measures taken in favor of ethnic minorities or in the health and education sector may also be exempted from the liberalization disciplines of the MAI.

The MAI could also reference the commitments concerning regulated service industries entered into by participating countries under the GATS. In other words, signatories of the GATS would not be required to assume additional obligations on market access and national treatment. This solution would protect the interests of countries that wish to maintain preferential treatment for their national cultural industries, especially audiovisual services.

In addition to the solutions outlined above, participating countries will have the possibility of lodging country-specific exceptions to protect non-conforming measures. Such exceptions are subject to review by the other participating countries and the Negotiating Group to ensure an acceptable balance of commitments among contracting parties. The regime of these exceptions will be governed by a few key principles:

- *top-down approach*: the obligations apply to all sectors and categories of measures not specifically covered by country exceptions;

- *standstill*: no new restrictions can be entered after the conclusion of the agreement and liberalization measures, which once introduced, become irreversible;

- *rollback*: countries are committed to submit to periodic reviews of their exceptions or participate in future rounds of negotiations with a view to extending the level of liberalization. Such periodic reviews operate by peer pressure but cannot impose new obligations on any country without its consent.

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establish mutually beneficial international rules which would not inhibit the normal non-discriminatory exercise of regulatory powers by governments and such exercise of regulatory powers would not amount to expropriation.

*Ministerial Statement, supra* note 2, ¶ 5.

## B. Protecting Existing Investment

Compared with national treatment and MFN, which are relative standards and subject to exceptions, the investment protection provisions of the agreement will provide absolute guarantees to existing investment, particularly in the areas of expropriation and compensation, transfer of benefits, and repatriation of capital. These provisions constitute a multilateral codification of standards already contained in bilateral agreements, regional agreements, and customary international law.

Recently, the question was raised as to whether general regulatory measures that do not deprive an enterprise of the title of property can be considered as equivalent to expropriation. While it is generally accepted that government action depriving an owner of the substance of its property, even without transfer of legal title, can amount to expropriation, the negotiators of the MAI have stated that regulatory acts of general application should not normally be considered an expropriation. This statement is consistent with legal practice and jurisprudence in most, if not all, participating countries.<sup>13</sup>

## C. Effective settlement of investment disputes

Investors greatly value the availability of effective procedures for quick settlement of claims against governments arising from alleged violations of international obligations. Recourse to arbitration is provided by the 1968 Washington Convention on the International Settlement of Investment Disputes, most bilateral investment treaties, NAFTA, and the ECT. Under the WTO, dispute settlement is limited to state-to-state procedures.

The MAI dispute settlement process will, in principle, apply the state-to-state and investor-state procedures to all obligations. Investors' direct recourse to arbitration will increase legal certainty and add credibility to the MAI. Investors will also avoid potential political conflicts; they no longer have to depend on their home governments to espouse their claims because the MAI provides a private cause of action. However, limitations have been proposed to protect participating countries' sovereign interests. Some negotiators believe that investor-state proceedings should not be available to challenge government decisions on the conditions of entry and establishment of foreign investment. Environmental organizations are concerned about a chilling effect on governmental protection of the environment, resulting from investor claims that environmental regulation amounts to expropriation. This issue can best be resolved through appro-

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13. A general definition of expropriation and similar measures is contained in the Agreement on the Multilateral Investment Guarantee Agency. See Multilateral Investment Guarantee Agency, Oct. 11, 1985, 24 I.L.M. 1605, T.I.A.S. No. 12,089, at 7.

Expropriation and similar measure: any legislative action or administrative action or omission attributable to the host government which has the effect of depriving the holder of a guarantee of his ownership or control of, or a substantial benefit from, his investment, with the exception of non-discriminatory measures of general application which governments normally take for the purpose of regulating economic activity in their territories.

*Id.*

priate drafting of the expropriation provision together with an interpretative statement that the exercise of general regulatory powers does not normally amount to expropriation.

Investor-state proceedings may raise important questions of interpretation of the agreement, and the decision of an arbitral panel may set a precedent for future application of the agreement. Therefore, it has been suggested that interested third parties, including governments, citizen groups, and non-governmental organizations (NGOs), be given the right to intervene before the panel or at least submit written statements. To ensure coherence of interpretation, an appeals procedure has been proposed.

Some critics argue that the MAI gives foreign investors a right to challenge government measures through dispute settlement, putting foreign investors in a better position than domestic enterprises. However, domestic enterprises can resort to national courts in a familiar legal environment. Another criticism is that dispute settlement is not available to governments wishing to sue investors. But host states enjoy the full force of their own law and can use government authority and their judicial system to take action against both domestic and foreign investors operating within their territory.

#### D. Societal Interests and Investors' Responsibilities

The MAI cannot be expected to provide a uniform set of rules for business activities. It is not intended to supersede national legislation or specific international agreements on matters such as competition, intellectual property rights, health and consumer protection, labor standards, industrial relations, or environmental protection. In other words, the MAI is not a constitution for the world economy, but is simply one important element of a broader international framework.

However, a foreign investment framework has undeniably wide effects on the physical, social, and economic development of individual countries. Multinational enterprises can bring substantial benefits and act as motors of economic development. The introduction to the OECD Guidelines recognized that "the complexity of these multinational enterprises and the difficulty of clearly perceiving their diverse structures, operations and policies sometimes give rise to concern."<sup>14</sup>

Investment is a means to care for the interests of present and future generations. Investment rules and disciplines should not hinder but rather promote sustainable development. Negotiators have broadly agreed on four elements to reflect societal interests in the MAI:

- placing into the preamble a strong reference to sustainable development, internationally recognized core labor standards and environmental protection;
- affirming the contracting parties' right to regulate to ensure that investment activity is undertaken in a manner sensitive to health, safety, and

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14. *OECD Guidelines for Multinational Enterprises: Text* (Dec. 17, 1998) <<http://www.oecd.org/daf/cmisis/cime/mnetext.htm>>.

environmental concerns provided that such measures are consistent with the agreement;

- prohibiting parties to the agreement from lowering health, safety, environmental, or labor standards to attract an investment;
- annexing the OECD Guidelines for Multinational Enterprises to the MAI.<sup>15</sup>

Since 1976, the OECD Guidelines have formed part of a balanced approach to international investment by Member countries. Although legally non-binding, the Guidelines express a firm expectation of governments in the behavior of multinational enterprises. They contain chapters concerning general corporate policies, disclosure of information, competition, taxation, employment and industrial relations, science and technology, and, since 1991, environmental protection. Despite some problems experienced by certain Member countries, the Guidelines have enjoyed support from business and trade unions and have proven to be an effective tool in promoting responsible conduct by enterprises in their respective countries.

The Guidelines are accompanied by follow-up procedures at both the national and international levels, which allow problems to be raised. The OECD Committee on International Investment and Multinational Enterprises is empowered to issue clarifications of the meaning of the Guidelines in specific circumstances.<sup>16</sup> In June 1998, the Committee decided to review the Guidelines to assess past problems and recommend any necessary revisions of substantive provisions and procedures.

Attaching the Guidelines to the MAI will not affect the non-binding nature of the instrument and will enhance its political appeal. MAI parties will automatically adhere to the Guidelines and participate in their implementation. At the same time, the Guidelines will preserve the parties' flexibility as changes in the text can be introduced by consensus of all parties without recourse to lengthy treaty amendment procedures.

### III. Perspectives of the MAI

Negotiating parties have drafted texts and are considering further proposals concerning all of the above elements. In addition, the treaty is likely to contain provisions extending its disciplines to privatization, de-monopolization, and concessions. A rather complicated article of the MAI deals with performance requirements, essentially prohibiting issues that have a distorting effect on trade and investment flows. Outstanding issues include: an economic integration proposal that would protect the harmonization and mutual recognition of laws among members of the European Union; the scope of general and country-specific exceptions; conflicting requirements; and secondary investment boycotts arising from the extraterritorial application of national measures. Solutions to these issues have been iden-

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15. See *Environment and Labor in the MAI: Chairman's Proposals, March 1998* (Aug. 11, 1998) <<http://www.oecd.org/daf/cm/mai/labenv.htm>>.

16. See OECD, *THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* 18 (1994).

tified and could be implemented rapidly in the concluding phase of the negotiations.

The last Ministerial Declaration did not set a deadline for resolution, but it is obvious that failure to move forward on the remaining critical issues would be fatal to the MAI. The negotiators will also have to decide the political feasibility of the agreement in light of the reaction of their constituencies and the ongoing public debate.

During the last twelve months, the MAI has been targeted by an internationally orchestrated campaign designed to stop or at least delay the agreement. In hindsight, the participating governments made a mistake in negotiating within tightly set deadlines without exposing key concepts of the agreement to public debate at an early stage. However, in a representative democracy, society is represented by elected governments. Treaty making powers lie with the executive branch of government, and parliaments make the final decision in the ratification process.

Negotiations were not conducted in secrecy. Ministers, not bureaucrats, decided to launch the process. Public information was available early in the process, and business and trade unions were informed and consulted through their advisory bodies at OECD. Non-member countries were aware of the MAI negotiations through regular briefings after each meeting of the Negotiating Group and were consulted through regional meetings held in Latin America, Asia and Africa.<sup>17</sup> Eight non-Member countries have joined the negotiations as observers and have obtained full access to all the proceedings of the Negotiating Group.<sup>18</sup>

It is true that public debate picked up relatively late after drafts of the agreement had been put on the internet, first by non-government organizations (NGOs), then by the OECD and the negotiating partners themselves. A first meeting between the Negotiating Group and NGOs representing environmental and consumer concerns held in October 1997 was beneficial because it helped identify critical issues and improved the draft of the agreement. At the same time, discussion on the MAI raised consciousness of the benefits and risks of globalization. The OECD Secretariat conducted an environmental assessment of the MAI and a study on its compatibility with multilateral environmental agreements.<sup>19</sup> The benefits of trade and investment liberalization were the subject of another OECD study published in Spring 1998.<sup>20</sup> The MAI was discussed in Spring 1998 at an OECD meeting of environment ministers and the annual high-level meeting of the Development Assistance Committee. A high-level advisory group on

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17. For an example of the published proceedings of one regional seminar, see OECD, *INVESTMENT POLICIES IN LATIN AMERICA AND MULTILATERAL RULES ON INVESTMENT* (1997).

18. The following countries participate as observers in the MAI Negotiating Group: Argentina, Brazil, Chile, Estonia, Hong Kong, China, Latvia, Lithuania, and the Slovak Republic. See *Ministerial Statement*, *supra* note 2.

19. See OECD, *Relationships Between the MAI and Selected Multilateral Environmental Agreements (MEAs)* (Mar. 13, 1998) <<http://www.oecd.org/daf/cmism/mai/meaenv.htm>>.

20. See OECD, *OPEN MARKETS MATTER: THE BENEFITS OF TRADE AND INVESTMENT LIBERALIZATION* (1998).

the environment discussed the potential of the MAI from the perspective of sustainable development.<sup>21</sup>

Although some of these studies have been criticized and the discussions remain controversial, the result is a more informed public debate on the challenges of globalization. Even the strongest critics of the MAI no longer contest the need for a multilateral investment agreement even if they suggest alternative processes and rules.<sup>22</sup> Beyond ideologies, there is now room for a substantive debate.

**Conclusion: What, then, are the conditions for a successful MAI?**

The MAI must be friendly to business, provide stable conditions and legal certainty for long term commitment of resources, ensure broad coverage, and set the stage for further liberalization.

The MAI must be friendly to labor, encourage the development of human resources, support core international labor standards, and prevent the lowering of standards as an incentive for investment.

The MAI must be friendly to the environment and promote sustainable development.

The MAI must encourage dialogue with all interested countries and offer a real partnership for shaping the future.

These elements are already in place, and the agreement which is emerging today is more balanced and more realistic than earlier blueprints. The MAI has the potential to make a decisive contribution to an equitable international framework of rules and better practices for the 21st Century. The MAI, therefore, merits strong support.

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21. See OECD, *The Report of the High Level Advisory Group on the Environment to the Secretary General of the OECD, Guiding the Transition to Sustainable Development: A Critical Role for the OECD* (Nov. 25, 1997) <<http://www.oecd.org/subject/sustdev/hlage.htm>>.

22. See Council of Canadians, *Towards a Citizens' MAI* (July 1998) <<http://www.canadians.org/citizensmai.html>>.

