

GENERAL DISTRIBUTION

OCDE/GD(95)65

A MULTILATERAL AGREEMENT ON INVESTMENT

**REPORT BY THE COMMITTEE ON INTERNATIONAL INVESTMENT AND
MULTINATIONAL ENTERPRISES (CIME) AND THE COMMITTEE ON CAPITAL
MOVEMENTS AND INVISIBLE TRANSACTIONS (CMIT)**

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Paris 1995

COMPLETE DOCUMENT AVAILABLE ON OLIS IN ITS ORIGINAL FORMAT

**Applications for permission to reproduce or translate all or part of this material should be addressed to:
Head of Publications Service, OECD, 2 rue André-Pascal, 75775 Paris Cedex 16, France**

Copyright OECD 1995

INTRODUCTION

The time is ripe to negotiate a multilateral agreement on investment (MAI) in the OECD. The Committee on International Investment and Multinational Enterprises (CIME) and the Committee on Capital Movements and Invisible Transactions (CMIT) are convinced that the foundations have now been laid for the successful negotiation of such an agreement building on OECD's existing instruments and expertise. (The technical analysis is summarised in the Annex.)

This agreement is needed to respond to the dramatic growth and transformation of foreign direct investment (FDI) which has been spurred by widespread liberalisation and increasing competition for investment capital. Foreign investors still encounter investment barriers, discriminatory treatment and uncertainties. OECD governments and the European Communities, the business community and labour are urging new multilateral rules which set high standards and a balanced and equitable framework for dealing with investment issues.

A multilateral agreement on investment would provide a strong and comprehensive framework for international investment and would strengthen the multilateral trading regime. It would set clear, consistent and transparent rules on liberalisation and investor protection, with dispute settlement, thereby underpinning the continued removal of barriers to market access and encouraging economic growth. It would be open to all OECD Members and the European Communities and to accession by non-OECD Member countries. The MAI would provide a benchmark against which potential investors would assess the openness and legal security offered by countries as investment locations. This would, in turn, act as a spur to further liberalisation.

Pursuant to the mandate of the June 1994 OECD Ministerial, the Committees therefore request that the meeting of the OECD Council at Ministerial level now adopt the mandate for negotiating a multilateral agreement on investment as set out in Section III. below. Although a major effort will be required by all parties to resolve outstanding issues under the new mandate, the objective would be to conclude the agreement by the time of the Ministerial meeting in 1997.

I. THE CASE FOR A MULTILATERAL AGREEMENT ON INVESTMENT IN THE OECD

Foreign direct investment (FDI) flows have grown spectacularly over the past years and have brought benefits not only to OECD countries long-accustomed to serving as FDI hosts and exporters, but also to a growing number of non-OECD countries especially those of the Dynamic Asian Economies, Latin America, and central and eastern Europe. Investment, both inward and outward, impacts positively on economic growth, productivity and competitiveness. Increasing competition for limited investment capital is drawing attention to the need for investment rules which preserve the benefits of FDI while providing a more level playing field.

Growth in FDI has been underpinned by widespread liberalisation which has swept away many formal governmental restrictions on investment and severely curtailed others. Remaining restrictions are a source of friction not least because they are widely perceived as barriers to market access. A tendency to resort to unilateral measures, including reciprocity, as a way of forcing more market access threatens to undermine the principle of non-discrimination on which OECD liberalisation has been traditionally based.

The OECD Codes of Liberalisation and the other investment instruments continue to be a positive force for liberalisation among OECD countries. However there is no comprehensive multilateral agreement on international investment.

Non-members are entering the investment scene as both recipient and source countries. Controversies which in the past impeded FDI flows to these countries have given way to more positive views towards open FDI regimes. It is unclear whether and how many non-Member countries would join a MAI but indications are that many of them are eager to discuss investment rules of the game which would confer mutual advantages to OECD and non-OECD countries. The Committees attach great importance to further developing dialogue with these countries as MAI negotiations proceed.

A carefully constructed investment agreement would not only ensure that there is no conflict between the investment and trading regimes but that these complement one another until such time as they might perhaps be successfully integrated. A state-of-the-art agreement negotiated in OECD would be an important step on the road to a truly universal investment regime.

The business community and labour, represented by BIAC and TUAC, strongly support a MAI which sets high standards and a balanced and equitable framework for dealing with investment issues.

II. FEATURES OF A MULTILATERAL AGREEMENT ON INVESTMENT

The MAI would build on the achievements of the present OECD instruments, consolidating and strengthening existing commitments under the Codes of Liberalisation and the 1976 Declaration and Decisions on International Investment and Multinational Enterprises. The aim of negotiations is to conclude an agreement incorporating rollback, standstill, national treatment and non-discrimination/most favoured nation (MFN) as well as new disciplines to improve market access and to strengthen the basis of mutual confidence between enterprises and states. The liberalisation obligations would be complemented by provisions on investment protection. The obligations under the agreement would need to be reinforced by effective dispute settlement procedures.

The agreement would be comprehensive in scope, covering all sectors under a broad definition of investment focusing mainly on FDI. The MAI would aim to raise the level of existing liberalisation based on a "top-down" approach under which the only exceptions permitted are those listed when adhering to the agreement and which are subject to progressive liberalisation. The multilateral character of the agreement would be reinforced by embodying the principles of national treatment and non-discrimination/MFN and by opening it to accession by non-Member countries.

In particular, the aim of the negotiations is to achieve an agreement, with a satisfactory scope and balance of commitments, that would:

- a) set high standards for the treatment and protection of investment;
- b) go beyond existing commitments to achieve a high standard of liberalisation covering both the establishment and post-establishment phase with broad obligations on national treatment, standstill, roll-back, non-discrimination/MFN, and transparency, and apply disciplines to areas of liberalisation not satisfactorily covered by the present OECD instruments;

- c) be legally binding and contain provisions regarding its enforcement;
- d) apply these commitments to all parties to the MAI at all levels of government;
- e) deal with measures taken in the context of regional economic integration organisations;
- f) encourage conciliation and provide for effective resolution of disputes, taking account of existing mechanisms;
- g) take account of Member countries' international commitments with a view to avoiding conflicts with agreements in the WTO such as GATS, TRIMS, and TRIPS; and with tax agreements; and similarly seek to avoid conflicts with internationally accepted principles of taxation.

The agreement would make an important contribution to strengthening the multilateral system by providing better protection, further liberalisation and a basis for co-operation with non-Members. Contacts will be maintained between OECD and other international organisations, including WTO and ICSID.

To ensure that areas of common interest are adequately addressed, there will be a need for close co-operation with the Trade Committee. Similarly, taxation aspects in the MAI will be examined with the Committee on Fiscal Affairs.

III. MANDATE

Accordingly, the Committees request a mandate from the Council at Ministerial level for the negotiation of a multilateral agreement on investment which would:

- provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures;
- be a free-standing international treaty open to all OECD Members and the European Communities, and to accession by non-OECD Member countries.

Close co-operation will be ensured with the appropriate OECD Committees, including the Trade Committee and the Committee on Fiscal Affairs to take account of areas of common interest.

Negotiations should commence immediately with the objective of reaching an agreement by the time of the Ministerial meeting in 1997, with a progress report to the Ministerial meeting in 1996.

Given the desirability of including non-Member countries in a MAI, arrangements will be made for consulting them as negotiations progress.

ANNEX

Since 1991, work on a multilateral agreement on investment has been conducted by the Committee on International Investment and Multinational Enterprises (CIME) and by the Committee on Capital Movements and Invisible Transactions (CMIT). The technical and analytical work was undertaken by five working groups, composed of independent governmental experts, set up in 1994 to explore the major issues of this agreement. The groups dealt respectively with liberalisation obligations under existing OECD instruments, liberalisation obligations in new areas, investment protection, dispute settlement, and the involvement of non-Members and institutional matters. This phase of intensive analysis included discussions of possible solutions, many of which were inspired by recently negotiated agreements such as the NAFTA, the Energy Charter Treaty, or bilateral investment treaties (BITs).

The following section is a summary of the main results of the working groups. It reflects the issues and options as identified by the groups during the preparatory phase for negotiations. This summary does not prejudge how the issues will be resolved in the context of the forthcoming negotiations.

Liberalisation

The MAI would aim to set high standards of liberalisation. Options have been identified which go well beyond the provisions of OECD instruments or even 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 the various procedures to implement these principles. This "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. Peer pressure to promote roll-back of remaining restrictions is another feature of the existing instruments that could be retained.

Difficult issues will no doubt concern qualifications to the basic obligations e.g., possible exceptions to non-discrimination including reciprocity measures and the issue of MFN and free-riders; the degree of liberalisation to be achieved as from the time the agreement takes effect; and the scope of a national security provision.

It is important to find a solution to the issues of subnational measures. Several options were identified based on solutions which were adopted by certain federal countries in other international agreements. The agreement would also need to deal with measures taken in the context of regional economic integration organisations taking account of the economic rationale for these measures. The goal in each case is to provide for stronger obligations than in the current OECD instruments and to apply those obligations equally to all parties to the MAI.

Further analysis of new liberalisation issues will need to be done including, the movement and employment of key personnel, mandatory performance requirements, privatisation, state enterprises, monopolies, concessions, corporate practices and investment incentives. The analysis so far suggests that as regards mandatory performance requirements there would be scope for the MAI to go further than the TRIMS agreement in addressing investment-distorting measures. While disciplines on key personnel, both their movement into a country and the right to employ personnel without regard to nationality, may be

covered in a MAI, the need to respect host country's immigration policy prerogatives is fully recognised. Rules providing for national treatment and non-discriminatory treatment of foreign investors in the case of privatisation will be examined. It might also be feasible to consider imposing disciplines on the behaviour of state enterprises and monopolies which would ensure national treatment and non-discrimination/MFN for foreign investors.

Investment Protection

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-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. Guidance may be found in the solutions adopted in bilateral and multilateral instruments.

The exact scope of the investment protection provisions will be determined by the outcome of the negotiations, particularly the definition of investment to which the protection provisions will apply and the dispute settlement mechanisms available to enforce them. There are different practices among Member countries with regard to such issues as the definition of expropriation and the conditions relating thereto (including due process), the method for calculating compensation (as well as the possibility of judicial review), the applicable exchange rate, and the right of transfer.

Dispute Settlement

The agreement would contain conciliation and dispute settlement mechanisms. The precise mechanisms would be a function of the definition of investment and the nature of the obligations that are developed in the agreement. The provisions on dispute settlement would be developed bearing in mind dispute settlement mechanisms in other fora.

While the MAI would be a stronger instrument if it provided for effective settlement for both investor-to-state and state-to-state disputes, the scope and application of such a provision are still to be decided. A question remains to what extent decisions relating to the establishment phase of investment can be referred to the state-to-state dispute resolution mechanism of the agreement. Another issue is whether an investor can bring a claim against a state for the breach of a liberalisation obligation regarding establishment. It would also be necessary to address the question of the application of dispute settlement provisions to REIOs.

There are other issues relating to both investor/state and state/state dispute settlement which are of a more technical nature and for which there are ample precedents in BITs and other investment agreements. Some further work may need to be done on these questions which include: the scope of

application of the dispute settlement provisions, the conditions for bringing dispute settlement (such as time limits/exhaustion of local remedies), how to provide for consent by the state, the avoidance of forum shopping, the forum for arbitration, consolidation, enforcement, and available remedies.

A single, broad, asset-based definition of investment in the agreement would offer the most comprehensive coverage. However, it remains to be determined how in fact the definition would be applied for the different obligations under the agreement, including dispute settlement. The taxation issues relating to dispute settlement under the agreement are being studied together with the Committee on Fiscal Affairs.

Non-Members and Institutional Matters

The MAI would be open to accession by those non-Member countries that are ready and able to take on the obligations of the agreement on terms and conditions to be agreed by all the contracting parties. Informal channels of communication are needed to exchange information as discussions proceed. The mechanism for accession to the MAI would allow the parties to preserve a satisfactory balance of commitments.

The prevailing view is that the MAI would be a free-standing agreement with links (still to be defined) to the OECD. The OECD would be responsible for supporting the functioning of a "parties group" where OECD and non-OECD countries that become parties to the agreement would participate on an equal footing. The OECD Agreement on Normal Competitive Conditions in the Commercial Shipbuilding and Repair Industry provides some indications of the role that such a group could have.

As regards the relation between the MAI and the OECD instruments, there will be political choices to be made, as well as some technical/legal questions. For the OECD Codes for Liberalisation, the assumption is that a MAI would cover (as a minimum) obligations on investment in the establishment and post-establishment phase, all associated capital flows, and the free transfer of income from capital (including interest, profits, dividends, and rents). What this implies for the Codes would be addressed in the context of the negotiations.

Similarly, the question of what happens to the different elements of the 1976 Declaration and Decisions on International Investment and Multinational Enterprises depends on what is ultimately included in a MAI. Certain elements, particularly the OECD Guidelines for Multinational Enterprises, could be incorporated as separate annexes, with references in the preamble to the MAI, depending on how the matter was treated under the MAI. This leaves open the question of the status of the relevant Council decisions on procedural matters and whether and how to associate non-Members with these decisions.

With respect to other (non-OECD) international agreements, bearing in mind the relevant legal rules on successive treaties on the same matter, a MAI should avoid conflicting obligations and allow better treatment for the investor to prevail. The degree of overlap, and therefore any potential conflict, can only be determined once the MAI obligations have been defined. However, the relation between a MAI and taxation agreements, as well as its interface with the GATS, TRIMS, and TRIPS agreements require special attention together with trade and fiscal experts. Results of negotiations completed elsewhere, such as specific service areas and their related provisions in the GATS, would be taken into account.