

OECD's MULTILATERAL AGREEMENT ON INVESTMENT

A Chinese Perspective



CHEN HUIPING

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KLUWER LAW INTERNATIONAL
THE HAGUE / LONDON / NEW YORK

Published by:

Kluwer Law International

P.O. Box 85889, 2508 CN The Hague, The Netherlands

sales@kli.wkap.nl

<http://www.kluwerlaw.com>

Sold and Distributed in North, Central and South America by:

Kluwer Law International

101 Philip Drive, Norwell, MA 02061, USA

kluwerlaw@wkap.com

Sold and Distributed in all other countries by:

Kluwer Law International

Distribution Centre, P.O. Box 322, 3300 AH Dordrecht, The Netherlands

A C.I.P. Catalogue record for this book is available from the Library of Congress

Printed on acid-free paper

ISBN 90-411-8893-2

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Kluwer Law International incorporates the imprint of Martinus Nijhoff Publishers

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OECD's Multilateral Agreement on Investment

I want to thank Professor An Chen, my former Ph.D. director, for his valuable input on this book and for his preface. Gratitude should be given to Dr. Marcel Brus, my supervisor at Leiden University, for his encouragement to write and his suggestions for revision of the book. I also want to thank Ms. Yu Zhanmin and Mr. Tian Xiuwen for their kind helping in typing part of the book.

Preface

OECD's Multilateral Agreement on Investment (MAI) was intended to be an international investment code and represented the new trends of multilateral investment legal frameworks. Being scholars of international economic law, Chen Huiping, my colleague and former Ph.D. student, and I, began to follow the MAI negotiations ever since 1997 when they were made public. In view of the significance of the MAI for the development of international investment law, it is important and urgent to study the MAI from Chinese and developing countries' perspective.

In 1999, Ms. Chen wrote her Ph.D. dissertation of which the MAI was the main subject. Her dissertation won high appraisal and evaluation from Chinese scholars. In 2000, she had a good chance to do further research on the MAI in Leiden University, the Netherlands. The abundant resources, her hard work, her deep insight and her good command of English enable her to do detailed study on the MAI from Chinese perspective and write this book in English.

The MAI does not belong merely to the developed countries, it also has impacts on the developing countries, so it is necessary for developing countries to have a say in such an international instrument. Ms. Chen is one of a few scholars from developing countries who make detailed analyses and comments on the MAI. Therefore, I believe this book is of high value and I am glad to accept her invitation to write the preface for her book.

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OECD's Multilateral Agreement on Investment

Contents

1. Introduction	1
2. An Overview of the MAI Negotiations	3
2.1 Introduction	3
2.2 Background of the MAI negotiations	4
2.2.1 Economic background	4
2.2.2 Legal background	6
2.3 A brief introduction to the process of the MAI negotiations	8
2.3.1 The first phase of the negotiations	8
2.3.2 The second phase of the negotiations	10
2.3.3 Outside the MAI negotiations	12
2.4 Reasons for the failure of the MAI negotiations	13
2.5 Conclusion	16
3. General Features of the MAI and the Approaches Adopted by the MAI	17
3.1 Introduction	17
3.2 General Features of the MAI	18
3.2.1 An Intended Comprehensive legally binding world-wide investment code	18
3.2.2 Broad scope of application of the Agreement	18
3.2.3 High standards for the treatment and protection of foreign investors and their investments	19
3.2.4 Strong and effective enforcement mechanism of the MAI	20
3.2.5 Uneven and unbalanced relations between the governments' obligations and the foreign investors' rights	20
3.3 Comments on the features of the MAI	21
3.4 Approaches adopted by the MAI	23
3.4.1 The top-down approach	23
3.4.2 The standstill approach	24
3.4.3 The rollback approach	25
3.5 Comments on the features and approaches of the MAI	26
3.6 Conclusion	26

4. An Analysis of the MAI's Scope of Application	
4.1 Introduction	27
4.2 Definition of investor	28
4.2.1 Definition of investor in the MAI	28
4.2.2 Arguments in drafting the definition of investor	31
4.2.2.1 Whether branches could be considered as investors	31
4.2.2.2 Whether contracting parties could be considered as investors	32
4.2.2.3 Whether the definition should be further restricted	33
4.2.2.4 Whether the definition should include a link between the investor and the activity of investing	33
4.2.3 Comments on the MAI's definition of investor	33
4.3 Definition of investment	34
4.3.1 General categories of investment in international investment agreement	35
4.3.2 Definition of investment in the MAI	36
4.3.3 Detailed analysis on the MAI's definition of investment	38
4.3.4 Features and restrictions of the MAI's definition of investment	44
4.3.4.1 Features of the MAI's definition of investment	44
4.3.4.2 Restrictions of the MAI's definition of investment	44
4.4 Conclusion	45
5. The MAI's General Principles for the Treatment of Foreign Investors and Their Investments	47
5.1 Introduction	47
5.2 Analysis of the MAI's general principles for the treatment of foreign investors and their investments	48
5.2.1 Implications of MAI's national treatment, most-favoured-nation treatment and transparency clauses	49
5.2.2 The exceptions and restrictions to the MAI's national treatment and most-favoured-nation treatment rules	55
5.3 Impacts of MAI's national treatment and most-favoured-nation treatment rules on international investment liberalization	58
5.3.1 The extension of national treatment will promote international investment liberalization	58
5.3.2 Extending national treatment and most-favoured-nation treatment to the admission of foreign investment is an important measure to realize international investment liberalization	60

5.4	Impacts of national treatment and international investment liberalization on developing countries	62
5.5	Conclusion	65
6.	The MAI's Specific Disciplines on Special Investment Issues	67
6.1	Introduction	67
6.2	MAI's disciplines on investors and key personnel	68
6.2.1	Relevant provisions on investors and key personnel in the BITs and other international investment agreements	68
6.2.2	MAI's disciplines on investors and key personnel	70
6.2.3	Related issue	72
6.3	MAI's disciplines on performance requirements	73
6.3.1	The issue	73
6.3.2	Existing disciplines on performance requirements	74
6.3.2.1	United States BIT Model	74
6.3.2.2	WTO TRIMs Agreement	75
6.3.2.3	Energy Charter Treaty	76
6.3.2.4	North American Free Trade Agreement (NAFTA)	76
6.3.2.5	APEC Non-binding Investment Principles	77
6.3.3	Arguments on performance requirements in the MAI negotiations	77
6.3.4	MAI's disciplines on performance requirements	78
6.3.5	Comments on the MAI's disciplines	79
6.4	MAI's disciplines on investment incentives	81
6.4.1	General issues on investment incentives	81
6.4.1.1	Definition of investment incentive	82
6.4.1.2	Different incentives used by different countries	83
6.4.1.3	How to evaluate investment incentives	84
6.4.2	An overview of existing international disciplines on investment incentives	84
6.4.2.1	The Treaty of Rome	85
6.4.2.2	The Agreement on the Harmonization of Fiscal Incentives to Industry	86
6.4.2.3	The OECD's International Investment Incentives and Disincentives	86
6.4.2.4	NAFTA	86
6.4.2.5	APEC Non-binding Investment Principles	86
6.4.2.6	Energy Charter Treaty	87
6.4.2.7	WTO Agreement on Subsidies and Countervailing Measures	87
6.4.2.8	TRIMs Agreement	88
6.4.3	Main arguments in the drafting process of the MAI	88
6.4.4	MAI's disciplines on investment incentives	90
6.4.4.1	Definition of investment incentives	91
6.4.4.2	MAI's disciplines for investment incentives	91
6.4.4.3	Built-in agenda for additional disciplines	93

6.4.5	Conclusion	94
6.5	MAI's disciplines on privatization	94
6.5.1	Introduction to privatization	94
6.5.2	Arguments in the MAI negotiations	95
6.5.3	MAI's disciplines on privatization	96
6.5.3.1	MAI's definition of privatization	96
6.5.3.2	Right to privatization	97
6.5.3.3	Treatment of privatization	97
6.5.3.4	Special share arrangements for privatization	98
6.5.3.5	Transparency rule	99
6.5.4	Conclusion	100
6.6	MAI's disciplines on monopolies, state enterprises and concession	100
6.6.1	Introduction	100
6.6.2	MAI's disciplines on monopolies	101
6.6.2.1	Existing rules on monopolies	101
6.6.2.2	MAI's definition of monopoly	101
6.6.2.3	MAI's rules on monopolies	102
6.6.3	MAI's disciplines on state enterprises	104
6.6.4	MAI's disciplines on concession	105
6.7	Conclusion	105
7	Investment Protection System of the MAI	107
7.1	Introduction	107
7.2	General treatment standards	109
7.2.1	Background	109
7.2.2	Fair and equitable treatment	110
7.2.3	Full and constant protection and security	113
7.2.4	Minimum standard of international law	114
7.2.5	Prohibition of unreasonable and/or discriminatory measures	115
7.2.6	Conclusion	117
7.3	Specific treatment standards	118
7.3.1	Expropriation and compensation	118
7.3.1.1	Controversies with regard to expropriation and compensation between developed and developing countries	118
7.3.1.2	MAI's rules on expropriation and compensation	120
7.3.2	Protection from strife	123
7.3.3	Transfer of payments	125
7.4	Conclusion	127
8.	The MAI's Dispute Settlement Mechanism	129
8.1	Introduction	129
8.2	State-state dispute settlement mechanism	130
8.2.1	Applicable scope	130
8.2.2	Steps to be taken in the resolution of disputes	131
8.2.3	The MAI's rules concerning arbitration	133

8.2.3.1	Formation of the arbitral tribunal	133
8.2.3.2	Arbitration rules	133
8.2.3.3	Applicable law	133
8.2.3.4	Provisional measures	133
8.2.3.5	Arbitral awards	134
8.2.3.6	Nullification of the awards	134
8.2.3.7	Non-execution of the award	135
8.2.3.8	Other rules concerning arbitration	137
8.3	Investor-state dispute settlement mechanism	137
8.3.1	Applicable scope	138
8.3.2	Means of settlement	140
8.3.3	Issues related to the MAI's arbitration rules	142
8.3.3.1	The contracting parties' consent to arbitration	142
8.3.3.2	Time periods for the submission to arbitration	144
8.3.3.3	Standing of the investment	145
8.3.3.4	Consolidation of multiple proceedings	146
8.3.3.5	Applicable law	146
8.3.3.6	Final awards	147
8.3.3.7	Enforcement of final awards	147
8.4	Comments on the investor-state mechanism	148
9.	Conclusion	151
	Bibliography	153

1. Introduction

The Organization of Economic Cooperation and Development (OECD) is the “Rich Man’s Club” of the developed countries in the world. The inward and outward investments in these developed countries account for at least two-thirds of foreign direct investment (FDI) in the world. Therefore, a comprehensive and effective multilateral framework for investment is of necessity and urgency for these countries. In 1995, OECD member states launched negotiations among them to create a Multilateral Agreement on Investment (MAI).¹ The intended MAI would be negotiated and adopted inside the OECD and then open for accession by any other states, the developing countries in particular. After almost three-year negotiations, an MAI Negotiating Text was made public in April 1998. The Text was the main result of the work of expert groups and the Negotiating Group, but had not yet been adopted by the Negotiating Group. Due to the facts that there existed many disagreements among these developed countries, the developing countries protested the MAI texts for procedural and substantive reasons, and the non-governmental organizations (NGOs) of environment, human rights, labour, etc. opposed the MAI negotiations, the OECD had to declare in December 1998 to stop the negotiations on the MAI.

Although the OECD’s intention to create an MAI inside OECD failed, they decided to advocate negotiations on such a multilateral investment agreement in the World Trade Organization (WTO). In the meanwhile, the WTO is ambitious to formulate multilateral rules for foreign investments in the near future. It established a Working Group on the Relationship between Trade and Investment after its first Ministerial Conference in Singapore in late 1996. Its purpose is obvious, that is, they try to find out the relationship between trade and investment and then they have reasonable excuse to negotiate investment rules in WTO—a global trade organization. In WTO’s fourth Ministerial Conference in Doha in November 2001, most developed countries tried again to list investment as one of the issues to be negotiated in the new round of negotiations but failed. The Conference decided to revert to this issue two years later. However, the study on the relationship between trade and investment in WTO continues, and there exists such a possibility that some time in the future a formal negotiation on investment rules would be held in WTO.

¹ The negotiating text (draft text) of the MAI is available at <http://www.oecd.org/daf/investment/fdi/mai/negtext.htm>.

On the other hand, the United Nations Conference on Trade and Development (UNCTAD) considered it necessary for the interest of developing countries to study the multilateral investment rules. According to the Midrand Declaration in May 1995, the "Commission on Investment, Technology and Related Financial Issues" was set up in UNCTAD to study the Possible Multilateral Framework on Investment (PMFI) so as to strengthen the understanding of this subject and to build the capacity of developing countries in international investment negotiations. At present, the Commission has convened several conferences on this subject and achieved positive results.

The above facts show that the international society is trying to create a multilateral legal framework for international investment in the past and future years. Therefore, it is sure that the OECD's MAI Negotiating Text will exert substantial impacts on such a framework. But both the MAI negotiations and the MAI Text have serious flaws and defects and are against the interest and standpoints of developing countries. So it is necessary to analyze and comment on the MAI from the developing countries perspective, with the hope that the future investment negotiations wherever they will be held will absorb the participation of developing countries, consider their special interest and reflect their demands and standpoints.

This book consists of nine chapters. Chapter One is an introduction to the book. Chapter Two analyzes the background of the MAI negotiations, briefly reviews the process and results of the negotiations and makes the author's comments on the negotiations. Chapter Three analyzes and evaluates the main features of MAI provisions and the approaches adopted by the MAI. Chapter Four studies the scope of application of the MAI through the analysis of the respective definitions of investor and investment in the MAI, and points out that the purpose of broad definition is to broaden the MAI's scope of application. Chapter Five analyzes and comments on the MAI's general principles of treatment accorded to foreign investors and their investments, and points out that the MAI's provisions in this regard have negative impacts on developing countries. Chapter Six introduces respectively the MAI's specific rules of treatment accorded to foreign investors and their investments in such new areas of international investment as performance requirements, investment incentives, key personnel, privatization, as well as monopoly, state enterprises and concessions. Chapter Seven analyzes and comments on the MAI's treatment provisions on investment protection, i.e., the fair and equitable treatment and full and constant protection and security treatment as the general treatment, and the specific treatment with regard to expropriation and compensation, protection from strife and transfers. Chapter Eight introduces and evaluates the MAI's dispute settlement mechanism: the state-state procedure and the investor-state procedure. Chapter Nine is the conclusion.

2. An Overview of the MAI Negotiations

2.1 INTRODUCTION

The efforts to make a comprehensive and effective legal framework for international investment first originated from the end of the Second World War and continued therefrom. Unfortunately, only agreements on some specific investment sectors such as the Energy Charter Treaty (ECT) and the General Agreement on Trade in Service (GATS), and the agreements on some specific aspects of investment activities such as the Agreement on Trade-related Investment Measures (TRIMs) and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs), were concluded. In 1990's, globalization of economy and liberalization of investment characterized the international economy and therefore an effective comprehensive investment agreement was in urgent need for those capital-export and capital-import countries. As a leading developed country, the United States pursued in the Uruguay Round to sign an enforceable multilateral investment agreement in the newly established WTO. But this suggestion was strongly opposed by developing countries. Then the United States considered that any negotiations on investment agreement in WTO would be refused by developing countries, so it would be better for such an investment agreement to be negotiated in the OECD and the developing countries could join in the agreement later on if they liked.¹ But European countries and Canada regarded WTO as the proper forum for investment negotiations because they wanted a level playing field including developing countries' interests.² Finally, the position of the United States was taken by all OECD countries. In September 1995, the OECD launched official negotiations on an international investment code—Multilateral Agreement on Investment (MAI).

The OECD consisted of 24 developed countries in 1994. From 1995, Mexico, Czech, Hungary, Poland, and Korea acceded to the OECD one by one. Now there are 29 member states in the OECD. The OECD members are the most important capital-export and capital-import countries in the world. For example, in 1980's and the early 1990's, the OECD members accounted for 95% of the total exported capital and 75% of the total imported capital in

¹ A. Böhrer, "The Struggle for a Multilateral Agreement on Investment—an Assessment of the Negotiation Process in the OECD", 41 *German Yearbook of International Law* (1998), p. 275.

² *Id.*

the world.³ That is why the OECD has always paid much attention to and played a pioneer role in international investment rules. In 1961, the OECD adopted the Code of Liberalization of Capital Movements and the Code of Liberalization of Current Invisible Operations. In 1976, the OECD adopted the Declaration on International Investment and Multilateral Enterprises. The Declaration consists of four parts: OECD Guidelines for Multilateral Enterprises, The National Treatment Instrument, Conflicting Requirements Imposed on Multilateral Enterprises, and International Investment Incentives and Disincentives. Until now, these investment rules are still the main rules regulating the investment among OECD countries. Therefore, it is no surprise that OECD took the lead in commencing the negotiations on the Multilateral Agreement on Investment.

The MAI was intended to be the state-of-the-art agreement to level the playing field, based on the existing OECD investment documents. The MAI was to be concluded among OECD countries and then open to any other countries. R. Ruggeiro, the former Director-general of the WTO, described the MAI as "the constitution for a single global economy".⁴

2.2 BACKGROUND OF THE MAI NEGOTIATIONS

2.2.1 Economic Background

From the end of the Second World War to the end of 1970's, the focus of the developed countries was on their own economic recovery from the War and their economy was in gradual development. Therefore most of their domestic capitals were invested inside the countries. On the other hand, more and more colonial countries gained independence from their metropolitan states. As a result of the cherishing of their economic independence and autonomy, they were more willing to be self-reliant in their economic development. They set up strict rules for the inflow of foreign investment. This accounts for one of the reasons why a global comprehensive investment agreement could not be concluded during that period.

Since 1980's, the economy of developed countries has reached quite an advanced level and the investment between them have been getting more and more active. The national power of developing countries has been consolidated and the development of economy gradually takes the focus position among their national affairs. Therefore, many developing countries including China tried to open their doors to absorb foreign investment so as to meet the capital demand in these countries. More and more foreign investments from developed countries come into developing countries. To sum up, foreign direct investments flowed into both developed countries and developing countries were in a surge in that era. The following table gives

³ OECD, *Towards Multilateral Investment Rules*, 1996, p. 19.

⁴ C. Raghavan, "Investment rules not dead, yet", *South - North Development Monitor (SUNS)* (Email edition), Issue 4156, Feb. 20, 1998.

concrete figures as to the FDI inflows to both developed and developing countries.

Foreign Direct Investment Inflows 1985–96, US\$ billions

	1985–90	1992	1994	1996
World	141.9	173.8	238.7	349.2
Developed Countries	116.7	119.7	142.4	208.2
Developing Countries	24.7	49.6	90.5	128.7
Least Developed Countries	0.6	1.5	1.0	1.6

Source: UNCTAD (1997) Table B.1.⁵

The above data show that the total amount of FDI in 1996 is more than twice as much as that from 1985 to 1990. The FDI invested in developing countries in 1996 is more than four times as much as that from 1985 to 1996. From 1985 to 1990, the FDI invested in developing countries accounts for less than one fifth of the total FDI in the world. But in 1996, the figure has exceeded one third.⁶ FDI in 1990's increased very fast and played a more and more important role in almost every country's economy. International investment and international trade constitute the two important pillars of the world economy.

International investment was also greatly stimulated by the constant and liberal development of world trade. In the traditional trade model, commodities were produced in one country and then transported to another country for sale. In modern trade model, commodities are directly produced, through the establishment of invested enterprises, in those countries with great potential market or with cheap labour and abundant natural resources. As to the trade in service, it is mostly conducted through the "commercial presence" (i.e., solely-owned enterprises, joint ventures or branches) established in different countries. Foreign investment is thus promoted and the pace of development of investment gradually exceeds that of the trade. Foreign investment and international trade are interrelated and build up together new model of world economy.

The multilateralization of investment activities is the characteristic of international investment in modern time. In the past, foreign investment came from one capital-export country to another capital-import country. This kind of investment concerned only two countries and could be well protected by traditional bilateral investment protection treaties. Nowadays, transnational corporations (TNCs) are distributed among many different countries. The great development of communication technology and financial service makes it possible that TNCs formulate their global strategy and accordingly arrange and organize their economic activities in different areas

⁵ Cited from E. V. K. FitzGerald, R. Cubero-Brealey and A. Lehmann, "The Development Implications of the Multilateral Agreement on Investment: A Report Commissioned by the UK Department for International Development" (21 March 1998), p. 10.

⁶ *Id.*, pp. 9–10.