

A BRIEF ANALYSIS OF THE MAI

BY ROBERT HOWSE & JONATHAN FELDMAN

Like the Investment Chapter of the NAFTA, the Draft Multilateral Agreement on Investment (MAI) has at its core the principle that governments must not discriminate against, or among, foreign investors from countries that have signed the agreement. These obligations are subject to reservations to be filed by individual signatories, subject to the principles of standstill and (possibly) rollback.

THE MOVEMENT OF KEY PERSONNEL

One of the areas in which the MAI has made significant progress is with the movement of key personnel. In a globalized economy, it is important for multinational corporations (MNCs) to have the opportunity to exchange managers and specialists between entities in different countries for an efficient development of human capital. While the notion of key personnel is not always precisely defined for the temporary entry of foreign personnel, regulations affecting visas, residence and work permits remain part of the country's immigration policy. A recent OECD survey points out that, despite any potential immigration problems that may arise, most members recognize that the "ability to quickly and easily move key personnel between countries is an important element of investment decisions, technology transfers as well as research and development activities of MNCs".¹

There have been some attempts (in other investment instruments) to address the issue of key personnel. For example, the NAFTA sets out commitments by its three members to facilitate, on a reciprocal basis, temporary entry into their respective territories of busi-

ness persons who are citizens of Canada, Mexico, or the United States. Each NAFTA country maintains its rights to protect the permanent employment base of its domestic labour force, to implement its own immigration policies and to protect the security of its own borders.² Even though

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the NAFTA categories are rather broad for business visitors, traders, intra-company transferees, and certain categories of professionals, this agreement has in many ways been able to strike the difficult balance of broadening the category of key personnel while maintaining sovereignty in the area of immigration. For example, the United States and Mexico have agreed to an annual numerical limit of 5,500 Mexican professionals being allowed to enter the United States.³ In devising the MAI, by contrast, the OECD has borrowed ideas from this treaty and extended its breadth to encompass all of its members.

The MAI reflects a "wider"

and "deeper" conception of the notion of key personnel. First, this agreement will apply to all of the Contracting Parties of the MAI.⁴ Although each Contracting Party has made a number of reservations,⁵ there is an overall consensus on the importance and necessity of such a provision in the treaty. The agreement demonstrates respect for state sovereignty; key personnel provisions remain subject to "the application of Contracting Parties' national laws, regulations and procedures affecting the entry, stay and work of natural persons".⁶ At the same time, however, this agreement breaks new ground by covering such broadly defined groups as investors seeking to provide essential technical services to the operation of an enterprise to which the investor has committed,⁷ employees working in the capacity of an executive, manager, or specialist,⁸ and spouses and minor children of these "key personnel".⁹

INVESTMENT PROTECTION

The OECD subcommittee, which is studying the broad issue of investment protection, concluded early on in the negotiating process that additional protection under a MAI may be of limited interest to MNCs unless it goes beyond the parameters established in existing instruments and domestic laws.¹⁰ This includes finding a definition of investment expropriation that is as broad as possible, namely "all measures adopted by a state whether direct or indirect that have the effect of depriving the investor of its investment".¹¹

A major concern with this broad approach to expropriation is that it could conceivably lead to investor claims against signatory states where regulatory changes, whether in environment, safety, or other areas, negatively affect the

value of the investment. This could make regulatory reform extremely costly, but is an interpretation of the meaning of expropriation quite common in U.S. domestic takings jurisprudence. Under a similar provision in NAFTA, a U.S. investor is now claiming millions of dollars in damages on the grounds that a ban on international and interprovincial trade in a substance that is produced in Canada constitutes "expropriation" (the notorious Ethyl case).

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Thus a sub-committee of Parliament that has examined the draft MAI text in detail has recommended that these provisions be clarified so as not to include liability to investors for losses or costs that occur due to regulatory changes.

DISPUTE SETTLEMENT

One of the most important proposals made in these negotiations has been to establish a binding dispute settlement system for Contracting Parties. While most parties agree that negotiated settlement of disputes is preferred, the current draft of the MAI itself has been designed to create the unconditional consent for investor-to-state and state-to-state arbitration. If the disputants can-

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not agree on a forum, then the ICSID, its Additional Facility, and UNCITRAL rules should be available under the MAI.

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The arbitration rules that apply to investor-state dispute settlement under the MAI contemplate a secret process, where neither the pleadings, nor the hearing before the arbitrator, nor the reasons for decision are public unless permitted by both parties. This practice might be entirely appropriate in the kind of commercial disputes between private parties for which arbitration was originally designed, or even in investor-state contexts where what is at issue is, for example, the interpretation of a contract between the state and an enterprise. Nonetheless, it seems highly questionable where arbitration is being used to interpret public international law, in whose meaning many parties have a stake. Also, many of the issues surrounding interpretation of the MAI are likely to pertain to the relationship of investor rights to domestic public policies—raising important democratic


concerns about the absence of publicity and transparency.

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In determining how to contend with “forks in the road”, many delegations have expressed concern about forum shopping.¹² NAFTA’s approach to this issue permits the investor to initiate local remedies but requires the investor to waive its rights to initiate or continue local remedies once arbitration is initiated. Moreover, NAFTA limits arbitral awards to monetary damages and applicable interest.¹³ To date, it is not entirely clear how the MAI will deal with this issue.

In the MAI negotiations, several delegations have suggested the creation of a state/state dispute settlement process within the OECD. Such a procedure might evolve in a manner similar to GATT panels.

Although there are still some practical difficulties in trying to determine how to ensure adequate enforcement, most delegations are interested in ensuring that any arbitration under the MAI is deemed binding. For example, the proposed agreement states that, “Each Contracting Party shall recognize an award rendered pursuant to this

Agreement as binding and shall enforce the pecuniary obligations imposed by that award as if it were a final judgment of its courts.”¹⁴ 

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NOTES

1. OECD Committee on Capital Movements and Invisible Transactions (hereinafter CCMIT), “Movement of Key Personnel” (Working Paper), 1994, at 3.
2. *Ibid.* at 12.
3. *Ibid.* at 13.
4. OECD Directorate for Financial, Fiscal and Enterprise Affairs Negotiating Group on the MAI, *Multilateral Agreement on Investment: Consolidated Text and Commentary*, 14 May 1997. Note that the scope of the agreement is quite wide and in Article II(I)(i.) an investor is defined broadly as “a natural person having the nationality of, or who is permanently residing in, a Contracting Party in accordance with its applicable law”.
5. For example, Canada, Mexico, and the United States maintained a reservation on the coverage of the article concerning Senior Management [and Membership on Boards of Directors].
6. MAI: *Consolidated Text and Commentary* at 15. This demonstration of respect is found in the Special Topics section

under Part I of the sub-section called Temporary Entry, Stay and Work of Investors and Key Personnel.

7. *Ibid.* [Part I(a)(i.)]

8. *Ibid.* [Part I(a)(ii.)]

9. *Ibid.* [Part I(b)(i.)]

10. MAI, *Chairman’s Summary Report—Investment Protection*, OLIS, May 1995, at 3-4.

11. *Ibid.*

12. *Ibid.*

13. See NAFTA Article XIX for the provision on Dispute Resolution.

14. Article V(D)(18) of the MAI on Dispute Settlement. (See DAF/MAI(1997)/REV 2 at 67).