SUMMARY OF PROPOSALS IN THE OECD MAI

What is in the MAI which is good!

Let's begin as the devil's advocate. The goal of the proposed MAI is to have a free-standing agreement of the highest standards, to be administered under an independent secretariat. Its main features are:

- *upfront* investment liberalisation (Italics mine),
- investor protection and
- dispute settlement.

Investment liberalisation

This would mean:

- transparency,
- standstill and rollback

It would apply to all restrictive measures like:

- screening,
- discrimination between foreign and domestic investors and
- performance requirements on the one hand, while buttressing
- national treatment and the
- right to enter and establish, and
- repatriate funds on the other.

Both the rights will be without let or hindrance, however derogation on balance of payments problem *may be* considered, but only for a temporary period.

Definition of investment

This will be as broad as possible covering both:

- tangible and intangible assets, including
- portfolio investment.

It will also subsume both:

- pre-establishment ie market access, and
- post-establishment phases.

Reservations and exceptions

These may be allowed but will be limited to:

- international peace & security (as per UN conventions),
- national security (military and defence) and
- public order.

The last, or for that matter any reservations, will have to be defined narrowly.

Investor Protection

Investors will have the right of national treatment under the most-favoured nation principle for both pre- and post-establishment phases. They will also be:

- protected from expropriation, nationalisation etc. If such an act takes place they will be entitled to:
- best and quick compensation to be paid in freely convertible currencies.

Dispute Settlement

Under the dispute settlement system, other than the:

- rights of states to action states, it will also include
- investors' right to action states at an international fora.

Though inconsistent with the WTO dispute settlement mechanism, it would provide investors with the first best solution to settle disputes against a host country.

So, it will be good for business with:

- unfettered rights to
- roam freely and
- set up shop anywhere for
- any kind of venture under the

What is not in the MAI which should be there!!

Investment liberalisation

Liberalisation cannot mean *laissez faire* and is subject to the sovereignty and development policies of any host country.

- The right of a state to allow or not to allow a foreign investor in a sector according to the nation's policy objectives, or without pre-screening.
- The right of a state to regulate investments in a particular sector for reasons of capacity, cultural grounds, media etc.
- The right of a state to allow only greenfield investments and disallow any takeovers, mergers, amalgamations, strategic alliances, which may or may not be anti-competitive.
- The right of a state to withold the investor's right of repatriation in the event of a balance of payment problem, or otherwise.

Obligations on investors

Under any jurisprudence, rights co-exist with a set of responsibilities for the beneficiary, and interfaced with obligations of the state as the protector. In as much as an agreement of high standard global investment liberalisation is being sought with high standards of obligations for the host countries, the investors' obligations in the MAI should also be of an equally high global standard.

Taking into account several internationally agreed conventions and agreements, the MAI should also include, as benchmarks, globally developed state-of-art provisions on technology, and regulatory and social policies covering areas such as:

Citizens' rights

- Human rights and culture, labour standards, consumer protection, competition policy and environment, including biodiversity.
- Transfer of latest technology which is environmentally sound.

Transparency and equity

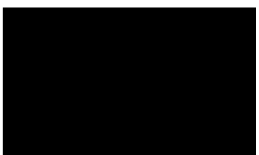
- Investors to furnish corporation-wide mandatory standards and operational guidelines, as modified from time to time, to a central registry and to the host country.
- Maintenance of accounts as per best international norms and control on transfer pricing and equity manipulation.
- Freedom of foreign subsidiaries/units to function as independent businesses as regards procurement and marketing without restrictions.

Dispute settlement

- Right of a state or citizen(s) to action an investor in its home country or international fora, as a balancing requirement on principles of natural justice.
- The Right should also be available to a group of states when similar violations take place in more than one country.

Proposal on annexing OECD Guidelines

There is a proposal to annex the OECD Guidelines for Multinational Enterprises 1976 as a non-binding text with a preambular statement—a facile argument to show that business obligations have been incorporated in the MAI.



I. THE ELEMENTS IN THE PROPOSED OECD MULTILATERAL AGREEMENT ON INVESTMENT (MAI), THEIR IMPACT AND ALTERNATIVES

Elements	What is being proposed	What does it mean	What is its impact	What is the alternative
A. ENTRY AND ESTABLISHMENT WITHOUT ANY SCREENING	Better market access ie the right of any foreign investor to freely establish on principles of most-favoured nation status, as prevailing in WTO. Under the proposed dispute settlement provisions, denial of market access can also be impugned.	It means that if an investor or type of investment is not acceptable by a country for any reason, its government, parliament and people will not be able to exercise any option at all. Eg Hindus in India consider the cow as sacred and do not eat beef. India has the largest organically-fed cattle population. A tiny amount of beef in India is allowed to be produced by local butchers for consumption by non-Hindus. If a foreign company wants to set up an eco-friendly beef plant in India—for exports only—will Hindus like it? MFN under the WTO is for import/export trade and cannot be analogous to investments. For trade a country has an option to trade or not to trade, subject to certain conditions.	Nations will be denied the right to allow or disallow any foreign investor or type of investment even if it goes against the country's preference or policy. If contries do such a thing it can be challenged by business entity/entities.	Free entry and establishment cannot be allowed and the powers to do so should rest with the people of that country ie the country's industrial policy, and other policy instruments, which are debated publicly and adopted by the country's parliament.
B. NATIONAL TREATMENT/ NON-DISCRIMINATION WITH FEW RESERVATIONS, EXCEPTIONS, DEROGATIONS	National treatment without any discrimination should be the cornerstone of the MAI both before and after the establishment. Reservations, exceptions and derogations allowed but narrow and well-defined. Exceptions being sought under 'public order' are being frowned upon and there are great differences on cultural carve-outs.	Any investor can raise a dispute on both pre-establishment and post-establishment discrimination. Any reservation and/or exception should be narrow, clearly defined and transparent. Derogations like balance of payments will not be allowed, or if at all, then for a temporary period only. Even if a foreign investor engages entirely local staff, its corporate nature will prevent it from appreciating local cultural values.	Even if the country decides not to allow any foreign investor or investment in, the investor can raise a dispute. On reservations and exceptions there is a broad agreement that on grounds of international peace and security or domestic security a country may disallow foreign investment. Eg Bofors, the Swedish arms and ammunition manufacturer cannot, by right, set up a plant in Belgium if the latter does not allow it. But if France wants to disallow any film maker to establish a unit in France, it cannot prohibit it. On the question of BOP, even under the WTO accords developing countries are allowed several derogations, but in this case it cannot be a ground. BOP crises can occur in OECD countries also, as was seen in Mexico. For instance, France doesn't want US to establish local production units for audio-visual programmes as it might inundate their own domestic industry, and thus Americanise their culture. Such a provision exists in the Treaty of Rome too, which is a closer integration agreement for European nations. Or Indonesia and India will not permit foreign media to establish for similar reasons and questions of national security.	The alternative is that every country has a sovereign right to distinguish between a domestic investor and foreign investor, like between a citizen and foreigner. Eg, a country might decide to support/subsidise a domestic enterprise for a long-gestation public utility project like a road or a bridge. A foreign investor may enter the sector, enjoy maximum advantages and then pack up when the going gets tough for any reason. Public order such as public health is a reasonable ground to disallow any investor. An analogy exists in Article XX of the GATT, where a country may ban imports of substances which may endanger life or health of people, animals or plants. Public order is a reasonable ground for either compulsory licencing or denial of patent rights under the TRIPs agreement so it should be a reasonable ground for the MAI also. A similar provision can be extended to investments also. Cultural sovereignty is a must, and countries should be allowed to withold permission to foreign investors in this sector.

Elements	What is being proposed	What does it mean	What is its impact	What is the alternative
C. STANDSTILL AND ROLLBACK	There will be a standtill on all investment regulations while all restrictions will be have to be rolled back when the MAI is signed on and/or acceded to.	All regulations which exist in any country will need to remain status quo without any amendments to improve them and such restrictions which exist will have to be dropped by amendments in the concerned laws. This can sweep across all sectors which have the slightest bearing on investments. These would include but not limited to: agricultural policy, consumer policy, land policy, health policy, environmental policy. All such policies can be challenged.	Suppose any law or regulation which due to current change in situation needs to be amended to improve its reach and it has an impact on investment it cannot be done. It is a widely accepted dictum that law-breakers are smarter than law-makers. For example, the BCCI collapsed due to management fraud and affected people of nearly every nation in the world. Now, after a detailed analysis, countries are planning tighter laws, stricter for foreign banks and lighter for domestic banks, but it cannot be done on two grounds: standstill commitments will prevent them and secondly there will be discrimination.	No self respecting country can agree to a broad commitment to standstill or rollback restrictive measures, but can only agree to a 'best endeavour clause' ie holding still investment regulations and rolling back such which are universally agreed subject to the approval of its own parliament. Even under the clause on investments in the APEC treaty, most decisions for relaxation are left to `best endeavour clause'.
D. TRANSFER OF FUNDS	Investors will have a right to transfer all money accrued due to profits, sale proceeds, proceeds from liquidation, payments for technical and managerial services, royalties from use of trade-marks or patents or other such intellectual property. Recourse to balance-of-payments consideration as a justification for restriction of such repatriation may not be allowed.	An unfettered right to transfer all money, even if the country is in a financially critical situation or any other valid grounds, is peculiar.	An unfettered right without any restrictions or without considering any obligations, legal or social, the investor may have towards the host country, will mean discrimination against domestic enterprises and local communities. Further about the BOP crisis, as mentioned at para on national treatment etc, even the WTO accords accept this as a concession to developing countries, so how can the MAI ignore it entirely. A country may have a genuine BOP problem and cannot allow unrestricted outflow.	This matter requires case by case approach in any country and the demands of investors can best be accomodated under a 'best endeavour clause'.
E. MOVEMENT OF KEY PERSON-NEL	Investors should be allowed free movement of key personnel between one and the other units regardless of nationality. There would be no restrictions or conditions on the nationality of board members.	It means that an investor can move personnel from one unit to another as it suits them and would not accept any conditions on appointment of board members from the host country.	Free unfettered movement of personnel from one unit/branch to another and vice versa can mean many things. One, due to reasons of political hostility among nations, if a particular national is not acceptable in that country eg posting a Cuban manager in a US branch will invite problems. As an extreme example, already the US under the Burton-Helms law, ludicrously, proposes prohibition of even visits of personnel from companies to USA if that company is doing business in Cuba. Secondly, there is the discrimination factor of huge differences in salaries between foreign and local managers doing the same job.	Movement of key personnel should be subject to the host country's approval on a case by case approach. Movement of natural persons, at least professionals, should also be liberalised as a quid pro quo. If movement of capital as a factor of production should be liberalised, so should labour which is also a factor of production.

Elements	What is being proposed	What does it mean	What is its impact	What is the alternative
F. INVESTOR PROTECTION	Provide for strong and effective protection for investors against nationalisation, expropriation, and if such an action does take place to include: • guarantees for prompt, adequate and effective compensation in freely usable currencies.	In the past many countries nationalised or expropriated assets of foreign investors offering little compensation or none at all or in local currencies, which clearly put the investor at a disadvantage. The operation of such a provision will also depend mostly on how the dispute settlement provisions are crafted.	Under the current globalisation and liberalisation process nationalisation or expropriation of foreign investor's assets is an extreme chance. But if a country decides to nationalise all units in one sector for development policy reasons eg all local and foreign banks are nationalised without any discrimination would there be a case for foreign investors alone. In any event a provision is being suggested because a country may need to take such measures broadly or even selectively (for very specific reasons like tax default or non-operation or closure) if it finds the situation adverse to its policy or people. How the compensation will be evaluated or paid will depend upon the situation prevailing.	There cannot be an across-the-board right of foreign investors without matching obligations. The obligations could include protection of the state, and its people, against: closure/disinvestment, tax evasion, illegitimate profits due to transfer pricing, environmental damage, consumers' interest etc. The argument that such protection is available under the domestic laws which a state can always invoke, is not valid—for two reasons. First, if multilateral investment rules are being created for investor protection, there is every reason to have matching obligations on investors for protection of states and its people. The second, and stronger, argument is that regulatory regimes, or its implementation, in states are never uniform and subject to being 'influenced'. Therefore multilaterisation of rules governing state protection against investors is imperative, so that—if required—their people can act. Eg the Bhopal Gas Tragedy case (see just below) the Government of India never made an extradition request to the USA for Warren Anderson.
G. DISPUTE SETTLEMENT	Provisions for both investor-state and state-state dispute settlement should be there which should also allow international arbitration or appeal to an international tribunal.	The provisions on dispute settlement are the most crucial for any agreement as they determine the exact spirit and letter of the agreement, and once a dispute is raised its settlement will interpret the meaning of the agreement and create case-law precedents. The right of state-state dispute settlement provision exists in the Vienna Convention and also under the WTO. But one fails to see any precedent in investor vs state dispute settlement provision unless such a clause exists in a contract. Even under the WTO rules, only a state can bring a dispute against another state, but a private party cannot.	One can understand the provision of state-state dispute settlement system, but one on investor-state is most ridiculous. Firstly, the EC wants the MAI to be integrated into the WTO family where no private party can raise a dispute. Secondly, the investor can action a state in its domestic jurisdiction and vice-versa. Thirdly, on the principles of non-discrimation, it would mean that a domestic investor will also have the right to action its own country in an international forum! Which self-respecting country will like that?	The alternative is that the dispute settlement provisions be restricted to state vs. state and the right of investors to action states be dropped altogether. If the latter has to be retained, then states, including their people, must have the right to action an investor in its home country and the government of the same must cooperate fully as it were an action filed by itself or its own citizens in its domain. Eg the Bhopal Gas Tragedy case, where the civil dispute was settled due to international pressure. But the criminal complaint for negligence against the then Union Carbide Corporation's chairman Warren Anderson is still pending in the Indian court. However, in the event of nationalisation/ expropriation an investor may have the right to action the host country in an international forum for a fair trial. This was also suggested in the OECD's Wider Investment Instrument, 1994.

II. THE MISSING ELEMENTS IN THE "MAI"

Elements	What is not being proposed	What should be there	Why
A. NATIONAL TREATMENT WITH NATION'S PRIORITIES	The right of any nation to have reservations and exceptions as per its own policy objectives. *(Read with I. A, B & C)*	Any country joining the MAI be allowed to hold national treatment reservations or exceptions under a broad criteria where such is warranted eg cultural reasons, infant industry, capacity saturation with a "best endeavour clause" which will assure least-discriminatory treatment to foreigners.	Any country may want to reserve specific sectors other than security on grounds of cultural needs or that projects of longterm nature which are best implemented by domestic enterprises or saturation of capacity. Eg Pakistan having a prohibition policy yet allows a distillery and a brewery to operate for meeting the needs of its non-Muslim citizens, and therefore will not allow any further investments in this sector. Or a situation might arise where a country has unutilised capacity in a sector and cannot foresee any export potential etc, it may not permit any expansion or addition. Quite often such situations cannot be forecasted at a given point of time, therefore a blanket agreement even with narrowly defined reservations and exceptions would not make sense.
B. TRANSPARENCY THROUGH NOTIFICATION PROCEDURES	Obligations by investors to notify the central secretariat of the MAI or the host governments of all corporate-wide mandatory standards and operational guidelines.	Investors must notify all its operational guidelines and mandatory standards, including the changes in them, to the central secretariat of the MAI which should provide an index and registry of such standards and guidelines. Such notifications should also be provided to the host country government which will be available to the public.	In view of investors developing and adopting operational guidelines and mandatory standards for units and branches, there is a need for transparency in the same. For instance, the safety standards being followed in a particularly hazardous chemical manufacturing industry like pesticides or service industry like aerial ropeways. A multinational investor continues to make improvements in its operating standards on the basis of experience which need to be conveyed to all concerned actors.
C. TRANSFER PRICING/ ACCOUNTING STANDARDS	Obligations by investors to desist from transfer pricing and maintain uniform transparent accounting standards.	The UNCTAD is already working on international accounting standards and reporting methods to close loopholes, which can form the basis of a harmonised system. While the OECD itself is working on transfer pricing to find ways on controlling the malaise. Such provisions must be incorporated in the MAI.	Investors must desist from adopting unfair methods to transfer profits and/or overload costs on inter-unit transfer of technology, raw materials, intermediates or finished goods. Simultaneously by following different standards of accounting firms evade taxes and/or paying dividends to shareholders. For instance, in 1994 Japan levied a $171 million penalty on Coca Cola for paying excessive royalties to its parent company in USA. In 1993, the Japanese car-maker Nissan paid fines of nearly $190 million to the US Internal Revenue Service for avoiding taxes by transferring part of its income from the US to Japan.
D. DISPUTE SETTLEMENT WHICH IS EQUITABLE	While state-state, and investor-state dispute settlement provisions are being proposed the reverse ie state-investor is not being proposed. *(Read with 1.G above)*	Provisions for dispute settlement under the MAI should include the rights of: • state to action an investor in its home country/countries • collection of states, when the violation takes place in more than one country. • victims including class-action suits against investors. These provisions should include mandatory cooperation from the governments of the country/countries concerned in both civil and criminal matters.	One can understand about the proposals on state-state dispute settlement provisions, but the one where the investor can action a state at an international forum, unless agreed to in a contract, is unheard of. It is argued that a state can always action an investor in local courts, which is indeed facile. In a local court the investor can always action the state as well. No state enjoys immunity from being actioned in courts under its jurisdiction. Secondly, citizens can action an investor or a state in local courts, but no provision is being made to incorporate that under the international jurisdiction.

Elements	What is not being proposed	What should be there	Why
E. HUMAN RIGHTS AND CULTURE	Obligations by investors to abide by the internationally recognised UN conventions on human rights and cultural protection not defined. An argument by the negotiators is that investors will have to comply with local laws. Compliance with local laws is not good enough, as it is argued below. *And this issue will run across all the following points on business obligations to abide by good regulatory and social policy objectives.*	The basic position of human rights and cultural protection as agreed internationally as well as a state of the art position must be defined under the MAI as an important obligation for all businesses to uphold in conducting their affairs. *Similar to the point made alongside, another important point which will run across from here to all the points below:* *"If the MAI proposes the highest standard agreement on investment, its natural corollary is that all social and regulatory policy dimensions should also be of the highest standard."*	If all countries are signatories to the UN convention on human rights and cultural protection then the same must form a part of the MAI. Often one comes across disregard for culture and violations of human rights by businesses, both foreign and domestic, and the laws and conventions which uphold the same must be respected. Quite often human rights and cultural protection in a country are diluted to suit investments/investors or even the local political expediencies and through such an insertion in the MAI, authoritarian regimes will not be able to or be influenced to dilute the same.
F. CONSUMER PROTECTION	Compliance with the principles laid down under the internationally agreed UN Guidelines for Consumer Protection 1985. The Guidelines are currently under revision to incorporate policy guidelines on sustainable consumption and the new areas resulting from trade liberalisation and economic reforms.	Investors must comply with the provisions of the UN Guidelines in its entirety so as to provide the highest standards of consumer protection in as much as they seek the highest standard agreement on investment. The revision in the Guidelines will create a state of the art policy framework which should be incorporated into the MAI. A consumer ombudsman at the international level who would receive complaints to analyse if there is a multinational pattern, and take appropriate measures. A notification system by the investors or their associations which will inform the consumer ombudsman, the central secretariat of the MAI and host goverments of any changes in their product problems such as recalls in one country, or design changes in another country, which need to be done internationally.	The Guidelines developed and accepted by the international community provide the policy framework for governments to follow in maintaining the highest standards of consumer protection covering areas: a) physical safety including product recall and liablity, b) economic interests including competition principles, c) standards, d) essential goods and services, e) redressal, f) education and information, and g) health and basic needs, If the MAI will incoporate compliance with the Guidelines, governments would have to abide by the same in bringing in the necessary high standards.
G. COMPETITION POLICY	Compliance with the principles laid down under the internationally agreed UNCTAD's document: The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, 1980.	Investors must comply with the provisions of the UNCTAD Set/code on RBPs so as to adhere to the highest standards of competition principles which provide protection to both rivals and to consumers in the market place. These provisions include the curbing of anti-competitive practices such as: • tied selling • resale price maintenance • exclusive dealing • reciprocal exclusivity • refusal to deal • differential pricing • predatory pricing • cartelisation • mergers, amalgamations and takeovers There is also a need for an international competition policy to face the new situations developing under the globalisation process.	In as much as investment is sought to be liberalised it will definitely improve competition but can be anti-competitive as against local enterprises by the sheer power of big businesses. For instance, and in direct relation to investment and competition is the case of the Japanese carmaker Suzuki not allowing its Indian subsidiary, Maruti, to export cars to some countries. Another instance, Coca Cola returned to India in 1991 and bought out a local cola (Thums Up) manufacturer by paying a fantastic price, and is now in a oligipolistic situation with just Pepsi Cola as its only competitor. In the context of globalisation, imagine a scenario that Coca Cola barters with Pepsi Cola the Indian territory in exchange for Indonesia, and each of them have an unbridled dominant share of the local markets.

Elements	What is not being proposed	What should be there	Why
H. ENVIRONMENTAL PROTECTION & SUSTAINABLE DEVELOPMENT	Compliance with commitments made by the international community under Agenda 21 etc, at the Earth Summit, particularly principles on sustainable production and consumption, transfer of technology, conservation of biodiversity etc are not being proposed.	Investors must comply with the provisions of Agenda 21 and other environmental conventions and accords in their entirety so as to provide the highest standards of environmental protection in as much as they seek the highest standard agreement on investment in all countries. The implementation process of the Agenda 21 needs to create a state of the art policy framework which should be incorporated in the MAI. An environmental ombudsman at the international level who would receive complaints to analyse if there is a multinational pattern, and take appropriate steps. A notification system by the investors or their associations which will inform the ombudsman, the central secretariat of the MAI and host goverments of any variations in environmental protection laws and standards from one country to another, which need to be tackled internationally, as business' responsibility in promoting the principles of sustainable development.	Most of the commitments made under Agenda 21 are of a nature which will curb activities of business considerably as they are interested in maintaining a business-as-usual position, though making noises about their contribution to environmental protection and preservation through guidelines and declarations. Yet the principles of environmental protection and sustainable development override that of unsustainable production and consumption.
I. WORKER PROTECTION	Compliance with the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, 1971 entered into among business, labour and governments, and adopted by the International Labour Office, which provide adequate guidelines in the field of employment, training, conditions of work and life and industrial relations on the basis of the several ILO Conventions as modified from time to time.	The basic position needs to defined while the ILO Tripartite Declaration duly revised needs to be incorporated. All ILO conventions need to be complied with under any investment regime. Workers should be provided the right to negotiate multinational work contracts. Businesses should not exploit or allow exploitation of their workers at their suppliers/sub-contractors by ensuring that they get full protection and decent wages, no less favourable than as prevailing in their home countries.	There is a whole raft of ILO Conventions which define worker's rights and protection. In spite of the fact that there is a consultative mechanism on labour matters in the OECD system, the Trade Union Advisory Committee (TUAC), incorporation of an agreed text ie the ILO tripartite declaration in the MAI is not happening. Rather what is happening is that the TUAC is being pushed into accepting the OECD Guidelines for Multinational Enterprises, 1975 as an non-binding attachment to the MAI. These guidelines are good in the context of everything stated in all the areas above, but what purpose they will serve without any enforcement mechanism.