



## France's Official Position 1998

### France's Official Position on Withdrawing From the MAI Negotiations

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#### **COMMENTS ON THE PROCEDURE AND METHODS**

Our mandate involves all multilateral economic negotiations which France is a party to.

As part of that mandate, the Government requested as a priority an interim report specifically addressing the Multilateral Agreement on Investment (MAI). The goal of the agreement is to liberalize investments (all investments) and provide better protection for investors. Negotiations began in April 1995 at the OECD, and were terminated in April 1998 because of strong opposition to the project in its existing form.

This interim report describes the results of consultations we held and proposals for future negotiations and their organization.

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#### **Analysis**

More than any other international economic agreement, the MAI has created opposition and tension within civil society. The extent and strength of the opposition and the speed with which it developed were surprising. Our consultations have shed light on this phenomenon and given us a clearer understanding of the positions and expectations of the various opinion sectors and professions.

Four points require particular attention.

##### **1- The opposition has taken on new forms**

- Opposition appeared simultaneously in several countries. The French Government is not alone in confronting opposition to the MAI. Opposition also is demonstrated, with the same strength, in the United States, Canada and some European Union countries. Objections have also been expressed in the

European Parliament and in community fora, including even within the Commission.

- It goes beyond sectoral or technical objections. As in any negotiations, there are concerns over the balance of concessions or the treatment of certain activities. In France, the cultural and audiovisual sector is naturally a focus of the opposition. However, the extent of hostility toward the MAI is proof of a broader and more fundamental concern.
- It involves new actors. Beyond the traditional representatives of professions, unions and economic institutions, non-governmental organizations are actively opposing the agreement. In Anglo-Saxon countries, NGOs, which have considerable resources (Greenpeace, WWF, Friends of the Earth, etc.) are at the root of opposition to the MAI. These organizations have developed and distributed in all countries an anti-MAI argument which is now being expressed, in similar terms, in various OECD countries.
- There is as much opposition to the negotiating method as to its contents and results. There is more or less legitimate opposition to the secrecy surrounding the negotiations and the underlying motivations of the participants.

The MAI thus marks a step in international economic negotiations. For the first time, we are witnessing the emergence of a 'global civil society' represented by non-governmental organizations, which are often active in several countries and communicate across borders. This is no doubt an irreversible change.

The organizations representing civil society have become aware of the stakes involved in international economic negotiations and are determined to leave their mark on them.

Furthermore, the development of the Internet is shaking up the world of negotiations. It allows for the instantaneous distribution of texts under discussion, the confidentiality of which is increasingly theoretical, and for the sharing of knowledge and expertise across borders. On a subject that is very technical, representatives of civil society appear to be fully informed, with critiques that are legally well-argued.

## **2- The opposition concerns the very structure of the agreement**

The agreement has become a symbol. It crystallizes civil society's objections to and frustrations with globalization. There is one central reason for this: the agreement is perceived as a serious threat to national sovereignty. It is essential to understand why.

By definition, any international agreement limits the sovereignty of signatory nations. It imposes on them obligations which restrict their freedom to act. However, economically, these obligations have always been, up to now, formulated in relative terms: nations agree not to discriminate within their territories, among products, investments, and even people, on the basis of nationality. Within this context, nations retain complete freedom to define and implement their economic and social policies. This principle has guided the whole drive toward the liberalization of economic and commercial trade for fifty years.

The MAI goes further. For the first time, within a universal multilateral agreement, the following absolute obligations are imposed on governments :

- it defines principles that have to be followed in the treatment of foreign investors (and these investors alone);
- it thus introduces an element of standardization of national policies;
- it implements a dispute settlement mechanism, allowing investors to contest and directly take governments before an international court, thus opening the

way to the creation through jurisprudence of new international law to the sole benefit of foreign corporations.

Considered separately, each of these innovations may seem technically justified. One can understand, in particular, the concern of negotiators to protect foreign investors in countries where the legal system does not guarantee impartiality. However, when combined, the result is explosive. It creates a feeling of a dual dissymmetry - between the rights of nations and the rights of corporations and between national and foreign investors (only the latter benefiting from the guarantees provided in the agreement).

This is a basic objection of all opponents to the agreement. It must be addressed and responded to because all other objections flow from it.

### **3- The OECD's organization of the negotiations was very inappropriate**

The OECD was not created to serve as a forum for negotiating major international economic agreements. Its experience in this area is limited to very technical agreements on export credits and shipbuilding, various codes with no binding force and, more recently, the International Convention on Corruption. Its procedures were designed to promote consultation and informal exchanges of opinions, not to formalize binding commitments or make strategic choices inherent to any negotiations.

In the case of the MAI, this method did not allow governments to exercise their political responsibility on essential issues. All work was done within the Negotiating Group, itself divided into several technical sub-groups. The press releases on the MAI submitted for approval by the Ministers were limited to yearly repetitions of the same generalities. At no time did the Secretariat bring the issues raised above to the attention of the Ministers, much less make them the subject of debates.

Nevertheless, beyond the points already mentioned, the agreement incorporates basic innovations in the liberalization method implemented. Unlike agreements made under the GATT or at the WTO, the MAI does not operate on the principle of positive lists or 'offers' but on the principle of reservations (this is called the "top-down" method). All economic sectors are liberalized, with the exception of exemptions appearing on lists submitted by each government. In addition, the MAI includes a provision called the 'ratchet effect' which allows for the automatic consolidation of any liberalization measure, i.e. making it irreversible. On these two points, no clear policy choice was submitted to the Ministers: the ratchet effect is never mentioned in ministerial press releases, nor is investor-state dispute settlement. As for the top-down approach, it is mentioned only in a technical report appended to the 1995 ministerial declaration.

Treating the MAI negotiation as a purely technical operation was a great mistake. It resulted in many of the problems encountered: the widespread feeling that the negotiations were secret, even clandestine; the inability of the organization to anticipate problems and solve them; and the surprise, experienced in several countries, over the extent of the opposition.

In contrast, the treatment the OECD reserves for union organizations demonstrates the benefits of in-depth, formalized consultation. Union organizations have always been closely tied to the OECD's work through a specialized organization, the TUAC. It is not by chance that, in France, as in other countries – and despite a certain divergence of opinions – unions who are members of the TUAC are largely less hostile to the MAI than other organizations representing civil society.

### **4- While the results of the consultation show a certain divergence of opinion, support for the MAI in its current form is limited, and where it exists, conditional.**

It should be pointed out that we did not encounter hostility in principle to foreign

investment. The attraction of foreign investment for the French economy, particularly its impact on employment, was raised by numerous interveners. The word 'delocalization'\* (with perhaps one exception) was never used. No one disputed the overall objective of international regulations on foreign investment. The principle of non-discrimination appears to be generally (but not unanimously) accepted. The diversity of opinions concerns the structure and terms of the current MAI, rather than the principle of an agreement:

- The CNPF is in favour of the agreement, as are most of the professional federations (with the exception of the insurance industry). However, the need to balance concessions between Europe and the United States was emphasized by all stakeholders, who were struck by the number of reservations lodged by the US. The people we spoke to do not recommend signing an agreement that is unbalanced in favour of the US and pay much attention to the issue of federally-structured governments, not only because of the difficulties encountered with the US, but also because of the risk that the MAI would set a precedent with respect to major emerging nations that also have a federal structure.
  - This attitude was also observed in very large corporations, for whom the legal safety of foreign investments is essential, given the nature of their activities (public service contracts, oil exploration, industrial facilities).
  - Also, for corporations as well as for employers' organizations, this positive opinion is qualified by the geographical scope of the agreement: beyond its principles, representatives of French corporations believe the MAI would only be of real interest if emerging countries also became signatories.

**\* Translators note: "Delocalization" generally refers to the shifting of production out of a community or country.**

- On the opposite side, some non-government organizations (specifically the Observatoire de la Mondialisation and Greenpeace) fundamentally reject the agreement because of the issue of sovereignty explained above.
- The cultural sector deserves specific comment. The profession is split between two opinions. One focuses on sectoral objectives and is asking that the MAI include the audiovisual reservation incorporated into the GATT that emerged from the Uruguay Round. The other is asking that the MAI include a clause exempting the cultural sector, and shares the more fundamental opposition of the NGOs. It is this faction that organized in-depth media coverage of the arguments against the MAI last February. However, these two perspectives converge on one demand: the exemption of author's rights from the MAI.
- Union organizations have diverse positions.
  - The CGT is opposed to the agreement for reasons of sovereignty and recommends restarting negotiations from zero.
  - FO is sensitive to the issue of social standards, but believes that essential progress on this should be expected from the ILO. This organization has stated its interest in an agreement that would incorporate strong social standards, while casting doubt on the willingness of some partners within the OECD – like the US – to achieve such a result. It also points out the threat of some provisions

- in the agreement to union freedom and the right to demonstrate (i.e., the clause regarding 'protection against civil strife').
- The CFDT is in favour of including binding clauses on social standards, but, even more so, wants union organizations to be allowed to actively participate in the Agreement's management and application. It sees the agreement as an instrument for promoting awareness of the social impact of foreign investments.

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## Proposals

The MAI sheds light on an essential problem that government must face in the management of relations between open, but sovereign, economies: how to adjust government responsibilities to the requirements of interdependence, without imposing unnecessary restrictions that would, in the court of public opinion, result in a rejection of liberalization?

Within the European Union, this issue is at the centre of the debate on subsidiarity.\* However, it has wider scope. With respect to foreign investment, can liberalization objectives be achieved by a simpler agreement that has less impact on national sovereignty because it is based only on the principles of free access and non-discrimination?

**\* Translator's note: "Subsidiarity" is a term used in discussions about the appropriate allocation of powers to different levels of government or to international bodies like the European Union.**

We believe the answer is yes. But the approach is demanding. It excludes both simply continuing the negotiations and a limited revision of the existing text. Negotiations should resume, if possible, but on new bases, to produce a different agreement.

### What to avoid

#### 1- Allowing negotiations to resume on the existing bases

This would be the natural tendency of the Secretariat of the OECD and certain delegations.

It is clear that French public opinion would not accept this. On the one hand, it would be impossible to obtain under these conditions the rebalancing of concessions requested by businesses, and on the other hand, opposition would be just as strong. Continuing the current negotiations thus appears neither possible nor desirable.

#### 2- Amending the existing text without changing its structure

- a. Improvements to the social and environmental clauses and on culture are certainly essential:
  - social and environmental standards: some progress on these issues should be possible, such as reference to basic social standards, some of which will constitute a reference for future agreements. However, it is important to be aware of the reluctance of some participants (Mexico, Japan) and the ambiguous attitude of the United States (relying on the capacity of states in a federation to refuse restrictive provisions);
  - cultural issues: a satisfactory resolution of cultural issues is an essential condition of any agreement. This involves addressing two issues under discussion: exempting culture and literary and artistic property rights. Incorporating the results obtained in 1993 for the audiovisual sector would satisfy a part of the cultural community. It could be a good compromise, if the issue of literary and artistic

property is also resolved in a way that protects the integrity of existing agreements.

- b. However, these improvements would, in themselves, be insufficient to reduce the level of basic opposition to the MAI:
- o social and environmental standards: given the current status of the discussions, obtaining binding provisions subject to the dispute resolution mechanism would be far from a sure thing;
  - o even a satisfactory result on the issues of social and environmental standards would not settle the debate in France on culture, nor the issue of national sovereignty. The union leaders we met with pointed out that the inclusion of social clauses in the MAI would not respond to the threat to national sovereignty in the draft agreement;
  - o finally, it should be noted that the inclusion of social and environmental standards in the MAI could end, or at least significantly reduce, the interest of emerging nations in the agreement.

### **3- Giving up on any international investment agreement is not desirable**

Given the existing disorder of globalization, it is in the interest of all countries to establish stable and equitable rules. An agreement may provide an opportunity to take a first step along the road to better regulation of the global economy by stabilizing investment regimes and achieving progress on social and environmental standards.

Conversely, a failure could weaken international co-operation at a time when the freedom of movement of capital is being opposed and called into question. As much in relation to public opinion as to regulations, confusion must be avoided between the flow of investments of a speculative nature and direct investment, which is much more stable. An agreement would allow this distinction to be made.

Furthermore, an agreement is in the interest of France and our corporations:

- France is a major player in the development of foreign direct investment. As the world's fourth-largest investor, France has a definite interest in an open and multilateral non-discriminatory and universal regime. France also ranks third in the world as a foreign investment destination.
- France has no interest in restricting direct investment. Because of the elimination of the review process in 1995, France is already completely open to foreign investment, on the condition that the rules of competition are respected. Any investor investing in France benefits from the protection provided by European treaties, including recourse to the Court of Justice of the European Communities. This point is not always clearly understood by opponents to the MAI.
- From the perspective of external investments, French interests are not threatened in OECD countries, where 80% of French foreign investments are located. There is potential for legal uncertainties, particularly in countries with a federal structure, but, with the exception of the issue of U.S. extraterritorial legislation, there is no real conflict. It should also be remembered that for investments in the European Community, there is a transparent and non-discriminatory legal framework whose enforceability is guaranteed by the Court of Justice. The EU is a major destination for French investment, representing between 1993 and 1997 from 52% to 63% of the flow of French investments, and 52% of French foreign investment stock in 1997.
- The situation is less satisfactory in emerging nations, where 17% of French investment flowed in 1997. The protection provided by bilateral agreements is effective in theory, but in practice, limited by the political constraints of

bilateral relations. It does not eliminate all potential for discrimination, and there are unequal degrees of openness among investment regimes.

- In economic terms, therefore, an agreement is positive if it ensures the opening of emerging nations under non-discriminatory conditions. However, it is neither urgent nor essential in OECD countries.

There are good reasons to seek an agreement, but not at any price. A new agreement should be negotiated that satisfies French interests and is acceptable to the public.

### **The Elements of a New Agreement**

#### **1- The structure of a new agreement**

The goal is to implement a non-discriminatory international framework for foreign investment without compromising national sovereignty. The new agreement would be centered on the two traditional principles of national treatment and non-discrimination.

National treatment requires that each country not discriminate in its own territory between national and foreign economic players. Under this framework, the government remains free to define and implement the public policies of its choice, in all areas.

Non-discrimination requires giving identical treatment to all foreign economic players, whatever their nationality. This principle is expressed in treaties through the most favoured nation clause.

Of course there are exceptions regarding these two principles. Regional bodies, such as the European Union, are a basis for preferential treatment among member countries, and thus are an exception to the principle of non-discrimination. Cultural policies in France and the European Union also override the principle of national treatment.

Technically, a new agreement can be reached if there is the political will, by eliminating all provisions limiting national sovereignty and imposing 'absolute' obligations on those governments, beyond the sole provision of non-discrimination. Whatever the forum for the next negotiations, the following seven conditions should be respected, at a minimum:

1. Exclude portfolio investments and transactions on money markets from the definition of investments. The scope of the agreement would be limited to foreign direct investment. There are two arguments for such a change. The first is institutional: the IMF is better equipped to handle those issues. The second is a practical one: in the current context, including monetary flows increases opposition and problems.
2. A dispute resolution mechanism open to governments only, not investors. This would respond to the criticism that the MAI serves the interests of a few major corporations who have the financial means to fight legal battles.
3. Elimination of the section on 'general treatment' of foreign investors, ensuring them 'full and constant protection.' This section is a clear example of an absolute obligation, the scope of which would be completely open to the interpretation of an international judge.
4. Elimination of the concept of 'measure of equivalent effect' to nationalization or expropriation, the interpretation of which by the same international judge could have the result that all public legislation and regulations that reduce the economic value of a foreign economic investment are declared non-compliant.
5. With respect to 'performance requirements', a decrease in the number of prohibited measures. This would be limited to using the existing corresponding WTO agreement, possibly enlarged to include services.

6. Elimination of the 'ratchet' clause, which makes irreversible any liberalization measure decided on by a government. It could be replaced with a 'deconsolidation' mechanism that would allow a government, as is the case with the WTO, to go back on a commitment, in return for compensation to its business partners.
7. France should emphasize its interest in the effective participation of emerging nations. We are not proposing this as a condition to continuing the negotiations, but rather making final signing of the agreement conditional on a sufficient number of those countries coming on board as parties to the agreement.

## **2- Negotiating forum: the OECD or WTO?**

There are two possible approaches to organizing negotiations for a new agreement.

- a. Try a new approach at the OECD. Obviously, this would involve a fundamental redirection of the MAI negotiations.

In this context, the top-down approach could be retained. This technically means using the current text and eliminating the most contentious passages.

If this solution were chosen, our partners would have to be very quickly notified that, without calling into question the usefulness of international rules on investment, France wishes to explore the possibility of a fundamental reorientation of the negotiations. But should this reorientation not occur, France would withdraw from the negotiations.

- b. Request that negotiations be opened at the WTO.

There would be some obstacles to negotiating an investment agreement at the WTO:

- o There is currently no consensus within the organization. Some developing nations are still very reluctant to the opening of negotiations.
- o Initiating negotiations at the WTO could only be decided during the next Ministerial Conference in December 1999. A WTO agreement could therefore only be reasonably expected at the beginning of the next decade.
- o It is more difficult to make progress on social and environmental standards at the WTO.

However, there are several advantages to the WTO:

- Emerging nations attend and participate.
- The WTO's approach is, a priori, less problematic from a sovereignty point of view. On the one hand, the top-down approach is not used at the WTO: negotiations are conducted according to the principle of positive lists or 'offers'. As well, only governments, and not private corporations, have access to the dispute resolution mechanism.
- French corporations are more favourable to the WTO, because they believe that they have real external interests with respect to emerging nations.

- This position is consistent with our multilateral approach favouring a broad agenda for future multilateral negotiations. We propose returning to this issue in the second phase of our work.

**In total, there are therefore two possibilities:**

- Resume the negotiations at the OECD, with the goal of obtaining a basic reorientation that complies with the aforementioned principles. The negotiation process is already underway, but the results are tenuous. There is no certainty that all the conditions we want can be satisfied. Similarly, the problems raised by the extent of US reservations may continue. This approach may lead, after some time, to the same problems experienced in the spring of 1998; or
- Request negotiations at the WTO and give the OECD an expertise and support role. However, in the absence of consensus, it would be necessary to persuade emerging nations. In that respect, the Asian crisis may produce a change in mind-set. Many countries in that region have liberalized their foreign investment rules. They may have an interest in consolidating that opening in exchange for advantages obtained in the context of a global negotiating round.

Based on our consultations, we cannot make a definitive choice between the two possibilities. **However, we believe that it is important that whatever the solution chosen by the government, France continue to work actively in favour of a multilateral agreement on the rules governing foreign investment. Such an approach fits both with its role and with its interests.**

**Comments on the Procedure and Methods**

In addition to the preceding comments on the OECD's organization of the negotiations, we would like to make the following comments:

**1- The under-estimation of the political stakes involved in the MAI**, together with habits of secrecy, resulted in the exclusion from the negotiations of most representatives of civil society. This produced a dual negative impact: on the one hand, strong opposition from those who felt excluded and, on the other hand, a split between the negotiations and the state of public opinion. This gap is often caused by a lack of distribution of documents, and has even less validity given that the concepts of secrecy and confidentiality have become very relative.

In the future, and for negotiations on sensitive texts, it will no doubt be essential that consultations are organized systematically:

- ad hoc consultations with affected stakeholders before and during certain negotiations. It should be remembered that some foreign delegations often include representatives from the business community, unions and increasingly, NGOs.
- ongoing consultation for all negotiations involving economic agreements (e.g., for the next round of WTO negotiations), which could take the form of a 'multilateral economic negotiations advisory council' in the Department of the Economy, Finance and Industry.
- regular contacts with the press, via mechanisms to be created, with the goal of not only keeping them informed but gathering their reactions and interpretations throughout negotiations.

2- Also, as is common in our country with respect to international relations, Parliament was not involved. Members of Parliament were not able to become aware of the issues at stake in the agreement until they were contacted by the NGOs, unions, or the press. In the future, it would no doubt be useful for both Assemblies to create a structure responsible for tracking key economic negotiations in order to systematically and regularly inform government officials when political problems arise. Arrangements could also be made, respecting their respective prerogatives, so that government officials in the Assemblies could be briefed by officials in the ministries responsible for the negotiations.

3- Procedural rules were respected. Meetings were held and memos exchanged. However, the MAI is a complex technical and political document. Some political problems could only be diagnosed at the end of the negotiations. The negotiations thus suffered from a lack of political direction.

4- The inter-ministerial team responsible for these very intensive negotiations, created under the direction of the Treasury, the DREE and the Ministry of Foreign Affairs, is a very competent, but small team. For this type of issue, resources should be increased, if only to deal with often larger teams of negotiators from other countries. In addition, if consultations are to continue, sufficient resources are required.

5- The hearings we held showed the importance of legal analysis skills for all concerned. NGOs in particular knew how to develop extremely in-depth analyses of the MAI, as did unions on certain items. Professional organizations did not always appear to have the same sources or means at their disposal. The MAI raises real legal problems pertaining to the rights and obligations of investors and governments. Similarly, implementation of the agreement, particularly the dispute settlement mechanism, would require real legal knowledge. It seems essential that our country, its government, professional associations, unions and businesses use legal specialists more extensively if they have not already done so.

It also seems important that universities train more legal specialists with knowledge of international economic law which is still very largely Anglo-Saxon.

6- Negotiation meetings do not always allow for an in-depth study of fundamental issues, and even less so a bringing together of different perspectives. To do this, bilateral contacts are essential before negotiation meetings. However, we have not yet sufficiently developed a forum at the political level for exchanging points of view with our counterparts in other countries, even within the European Union. Although arguments (e.g., on the 'cultural exemption' and social and environmental standards) are strong and should find more supporters, France was not able to garner all the potential support of our partners, their Parliaments, unions and associations and the European Parliament.

It is important that we have sufficient contacts and information to make an open and assertive presentation of our positions, especially since those choices may be better understood and more convincing if presented clearly.

**[Two appendices, not included in this translation, follow in the French original:**

**- A list of persons consulted**

**- A statistical analysis of international investment]**