



Negotiating Group on the Multilateral Agreement on Investment (MAI)

**AIDE MEMOIRE OF THE MEETING OF THE NEGOTIATING GROUP
ON THE MAI HELD ON 25-26 JANUARY 1996**

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At its meeting on 25-26 January 1996, the Negotiating Group had an orientation debate on taxation issues with a view to promoting greater understanding of the issues that are likely to arise at the interface between taxation and MAI obligations. The Group recognised that while specific MAI obligations are still to be decided, the MAI is intended as a comprehensive agreement on investment that will include obligations on national treatment, MFN, standstill, rollback, investment protection, and dispute settlement. As these obligations take shape, taxation officials will want to ensure the integrity of the international network of double taxation treaties, the preservation of the government's revenue raising ability, and the closing of tax avoidance opportunities.

The Chairman made some preliminary observations on the basis of this discussion. To a certain extent, the existing tax treaty system and the MAI share an important goal, that of fostering international trade and investment. There are also broadly similar principles - non-discrimination, MFN, national treatment, although the application of these principles might vary in the investment and taxation contexts. Nevertheless, it is necessary to reconcile the interests of preserving the taxation system, on the one hand, and providing a comprehensive framework for foreign investors, on the other. Solutions which take account of both sides of the issue need to be sought after extensive examination and discussion.

For this purpose, the Negotiating Group agreed to establish an Experts Group on the treatment of taxation measures in the MAI, comprised of taxation and investment experts, which would commence work in April 1996.

On the basis of the Group's previous discussion on the definition of investment, the Chairman proposed that the MAI adopt a single, broad, asset-based definition of investment linked to the activities of an enterprise. The link to the activities of an enterprise was intended to draw a line between assets representing all forms of investment and purely financial transactions that might occur in capital or money markets, for example.

There was some concern expressed that a broad, asset-based definition of investment (appropriate in the post-establishment phase) could, if applied to cross-border transactions, result in the creation of pre-establishment obligations with respect to a wide range of capital movements. It was recognised, however, that it might be difficult to distinguish between foreign direct investment and portfolio investment. Most delegations agreed to the idea of including an illustrative list of assets as part of the definition of investment.

Following bilateral treaty practice, the definition of investor could include natural persons of a party and enterprises constituted in accordance with the law of a party. Views varied on whether investor should cover companies organised in third countries but controlled by an investor of a party. Questions relating to whether an investor would include direct branches, sole proprietorships, representative offices, and non-profit organisations, were more a question of the form of the investment rather than a question of defining the investor and should be addressed by a drafting group.

In his summary, the Chairman noted the convergence in favour of a broad definition of investment and investor, applying to pre and post establishment, and covering tangible and intangible assets. A "cut-off" point might need to be considered which would exclude purely financial transactions

from the scope of the definition. He proposed that a drafting group take up the analysis of this question. The Negotiating Group agreed to amend the mandate of Drafting Group 2 on the treatment of investment and investor and to charge it with the drafting of specific provisions on the definition of investment and investors.

The Group examined issues relating to the definition of key personnel, temporary entry, and the freedom to hire persons already in a country holding valid resident and working permits, as well as nationality requirements for board members and senior management positions.

Key personnel is an important topic for the international business community. The GATS and the ECT provide examples of how this issue could be dealt with in the MAI. The NAFTA also contains a provision prohibiting nationality requirements for senior management positions. Some delegations thought that the MAI could perhaps go further in some areas, while still taking account of sensitive national concerns relating to immigration and labour laws and policies.

From the discussion, the Chairman concluded that there is a need for a provision in the MAI dealing with the issue of key personnel. The provision should be based on a fairly broad definition of key personnel, linked to functions. It should address the temporary entry of personnel and the freedom to hire key personnel using the models of the GATS, ECT and NAFTA, but providing for stronger disciplines wherever this is possible. A working group on special topics should be set up in due course to explore possible MAI obligations in this area.

Performance requirements which distort investment decisions and flows could undermine the goal of the MAI to create a liberal climate for international investment. Performance requirements are addressed in the context of other international agreements, including the TRIMs, NAFTA and ECT. Disciplines range from national treatment, MFN, and transparency, to - in some cases- a prohibition of certain performance requirements, whether or not discriminatory against foreign investors.

Many delegations were of the opinion that national treatment obligations alone would not be sufficient in a state of the art agreement. There were different views as to the utility of distinguishing between mandatory and voluntary performance requirements, although it might be necessary to consider applying different disciplines.

The Chairman summarised the main points of the discussion. There was a majority in favour of liberal and progressive treatment, going beyond existing agreements. The national treatment principle should apply to performance requirements. Consideration should be given to capturing non-discriminatory requirements, both mandatory and voluntary, whether at the central or sub-federal level. A working group should identify the investment distorting performance requirements which could be covered by the MAI. The ECT, TRIMs and NAFTA agreements could provide guidance on how to treat such measures in the MAI. The group will need to give particular consideration to the interface between MAI provisions on performance requirements and the TRIMs, including the implications for the dispute settlement mechanisms of the MAI and the WTO.

Delegations were concerned with the potentially distortive impact associated with some investment incentives, particularly those that could lead to competitive bidding among governments. The issue is particularly sensitive when incentives are offered by governments in an attempt to stimulate job creation, to develop specific industries or to attract investment to specific areas. Some delegations proposed that in-depth analytical work be carried out in this area but they could already anticipate difficulties with an outright prohibition in the MAI on investment incentives.

The Chairman recalled that the MAI objective of setting high standards should also be reflected in the treatment of investment incentives. Although there was support for an ambitious approach, the Chairman noted that many delegations were more cautious. He proposed that a starting point could be to consolidate existing disciplines in the ECT, the NAFTA and the WTO. Many delegations wanted transparency rules which would also capture incentives at the state or regional level.

The Chairman proposed that a working group identify the categories of investment incentives which needed further scrutiny. He saw scope for a provision which applied national treatment, transparency procedures, peer pressure, and consultations as part of a mechanism for dealing with investment incentives. Standstill and rollback obligations would be more difficult to develop. A working group should look at how far MAI obligations, including dispute settlement, could apply to a list of investment incentives.

The Group discussed whether there would be a need for a specific provision in the MAI concerning technology research and development. Drawing on the interventions by delegations, the Chairman concluded that application of the general principles of the MAI would be the most effective way of dealing with the concerns associated with government promotion of technology R&D programmes. What is needed is a broad definition of investment and a narrow scope of application of the general exceptions provisions relating to national security. While a specific provision was unnecessary, the issues concerned with technology/R&D should be kept in mind by all of the MAI drafting/expert groups.

At an earlier discussion by the Negotiating Group on whether the MAI dispute settlement mechanism should be open to disputes arising from other investment agreements, the Chairman had drawn the conclusion that there might be a case for bringing within the ambit of the MAI specific commitments made by a state in an investment agreement with an investor [Aide Memoire DAFPE/INV/IME(96)8], but excluding rights arising from other international agreements.

The Chairman confirmed that the question should be studied from the more narrow perspective of protecting the specific commitments made to an investor. Many bilateral investment treaties contain such a clause and could be used as models for consideration by a drafting group. He proposed that Mr. Haas, chairman of Drafting Group 1 on selected topics concerning investment protection, be invited to prepare a draft provision in consultation with the members of his Drafting Group. The Negotiating Group could examine this proposal at its March meeting in the context of its follow-up to the Drafting Group's report.

The Group approved the draft agendas for 14-15 March 1996 and 18-19 April 1996. (See annex 1).

-- *Taxation*

The Negotiating Group approved the mandate of the new Expert Group on the treatment of tax measures in the MAI (see annex 2) and appointed Mr. Revilla (Mexico) as chairman and Mr. Newton (United Kingdom) as vice-chairman. The Expert Group will meet in April and May and will report to the Negotiating Group in June.

-- *Definition of investment*

The Negotiating Group adopted the revised mandate for Drafting Group 2 on selected topics concerning the treatment of investors and investment. (See annex 3). The Group will draft specific

provisions on the definition of investors and investment and will report on this issue to the Negotiating Group in April.

-- *Special topics*

The Group agreed on the need for a new group which would be charged with examining the treatment of selected special topics. However, the mandate for this new group as well as the scheduling of its first meeting will be considered by the Group at its March meeting.

-- *Protecting investor rights*

The Negotiating Group invited Mr. Haas to prepare, in consultation with the members of his Group on selected topics concerning investment protection, a draft provision on protecting investor rights arising from specific commitments made pursuant to an investment agreement between an investor and a host state. This draft text would be examined by the Negotiating Group at its March meeting.

A list of meeting dates for 1996 and 1997 is provided in annex 4.

ANNEX 1

MAI: Draft Agendas for March and April 1996

14-15 March 1996

1. Treatment of Investment and Investors
 - a. Report by Drafting Group N° 2
 - b. Non-discriminatory barriers to establishment
2. Investor Protection issues
 - a. Follow-up to the Report by DG1
 - b. Protecting Investor Rights arising from other agreements
3. Special topics:
 - Privatisation
 - Monopolies/state owned enterprises
 - Corporate Practices

Drafting/Expert Groups

6-8 March EG1 on Dispute Settlement and Geographical Scope (second meeting)

11-13 March DG2 on Definition and Treatment of Investors and Investments (third meeting)

18-19 April 1996

1. Accession of Non-Members
2. Report by DG2 on definitions of investors and investments
3. Report by Expert Group on Dispute Settlement and Geographical Scope
4. Interim Report by CIME/CMIT on the Analytical Inventory of Measures affecting Investment
5. Progress Report to Ministers
- [6. Further discussion of (selected) Special Topics (if necessary)]

Drafting/Expert Groups

15-16 April EG1 Dispute Settlement and Geographical Scope (third meeting)

17 April DG2 Definition and Treatment of Investors and Investments (fourth meeting)

22-24 April EG2 on Taxation (first meeting)

ANNEX 2

Mandate of Expert Group No. 2 on the “Treatment of Tax Measures in the MAI”

1. The Expert Group, open to the participation of all delegations, is charged with examining the tax issues raised by the work of Drafting Groups 1 and 2, and of the Expert Group on Dispute Settlement, and offering possible solutions to these issues.
2. The Expert Group will meet in April and May 1996; it will report to the MAI Negotiating Group in June 1996.
3. The Group’s mandate will terminate after its report to the Negotiating Group, unless the Negotiating Group decides otherwise.

ANNEX 3

Revised Mandate Of Drafting Group N° 2

"Selected Topics Concerning Definition And Treatment Of Investors And Investments (Pre- And Post-Establishment)"

1. The Drafting Group, open to the participation of all delegations, is charged with drafting specific provisions to be included in the MAI on selected topics concerning the definition and treatment of investors and investments (pre/post establishment).
2. Topics:
 - a. National Treatment and Non-discrimination/MFN
 - b. Transparency
 - c. General exceptions concerning public order, national security, and international peace and security

National Treatment and Non-discrimination/MFN should be defined in full and unconditional terms.
3. The Drafting Group is charged with considering mechanisms for standstill, rollback and the listing of country specific reservations.
4. The Drafting Group is also charged with drafting specific provisions to be included in the MAI on the definition of investors and investments.
5. The Group will report to the Negotiating Group at its March 1996 session and submit proposals concerning paragraphs 2 and 3 above, including proposals for text, in accordance with its mandate. Proposals concerning paragraph 4 will be submitted to the Negotiating Group at its April 1996 session.
6. The Group will terminate after these reports have been made, unless the Negotiating Group decides otherwise.

ANNEX 4

TENTATIVE DATES FOR REMAINDER OF 1996

March 6-8	Expert Group N° 1 on Dispute Settlement and Geographical Scope
March 11-13	Drafting Group N° 1 on Treatment of Investors/Investment
March 14-15	Negotiating Group
April 15-16	Expert Group N° 1 on Dispute Settlement and Geographical Scope
17 April	Drafting Group N° 1 on Treatment of Investors/Investment
18-19 April	Negotiating Group
22-24 April	Expert Group N° 2 on Treatment of Tax Measures in the MAI
June 17-21	
September 9-13	
October 21-25	
December 9-13	

TENTATIVE DATES FOR 1997

January 20-24
February 24-29
March 24-29
April 2-7