



---

**Negotiating Group on the Multilateral Agreement on Investment (MAI)**

**AIDE MEMOIRE OF THE MEETING OF THE NEGOTIATING GROUP  
ON THE MAI HELD ON 19-21 JUNE 1996**

## **AIDE MEMOIRE OF THE MEETING OF THE NEGOTIATING GROUP ON THE MAI HELD ON 19-21 JUNE 1996**

The Negotiating Group addressed the issues selected by the Chairman drawn from the reports of Drafting Groups 1 and 2.

### Definition of Investor

The Chairman concluded that there appears to be no fundamental problem with including permanent residents in the definition of investor. Some concerns still have to be dealt with, particularly the standing of permanent residents for purposes of dispute settlement. These were referred to the Expert Group on Dispute Settlement (EG1).

The Chairman noted that many delegations were in favour of including branches in the definition of investment. However, there are a number of problems, including:

- (i) letter-box operations with no substantial business activity. A denial of benefits provision was identified as a likely solution and NAFTA 1113 was cited as a possible example.
- (ii) the legal problems that could arise in the case that the parent of the branch is not an MAI party.
- (iii) situations where branches (and other business forms such as joint ventures) may not have the legal capacity to make investments. The Chairman thought that this question needs further consideration.

In conclusion, the Chairman requested Drafting Group N° 3 (DG3) to try to find a solution so that branches are included in the definition of investor, addressing the concerns that were raised in this discussion.

### Definition of Investment

There is consensus on the need for a broad asset-based definition. The Chairman noted that many delegations said that the list of assets should be an open list to ensure that all assets were covered for investment protection purposes. Consequently, he suggested that the brackets around "including" in the definition could be dropped. However, doubts were expressed as to whether the open-ended approach would work for the establishment phase. Various concerns were mentioned here, mostly concerning cross-border financial transactions and trade financing.

The Chairman agreed that some way should be found to qualify the definition, at least when applied to the establishment phase. Different ideas are being considered, including the use of a negative list approach (as in NAFTA). If such a negative list approach were adopted, the Drafting Group should determine what is to be included in the negative list, whether it should be open or closed, and whether the assets should be excluded for all purposes or only for the establishment phase. He proposed that DG3 explore this further.

The Chairman noted that a number of related questions are still on the table, including the need for a balance of payments derogation clause, the need for a special clause to deal with prudential measures, and the questions raised with respect to the International Monetary Fund.

A number of countries were in favour of including indirect investment because they believe the MAI should provide for the broadest possible coverage. Other delegations noted their concerns that including indirect investment might give rise to a problem of free-riders and might complicate the legal issue of standing for dispute settlement.

The Chairman proposed that DG3 should try to find a solution which would cover new investment by established holding companies in the same country and investment via a third country which is a party to the MAI. He noted more divergent views as to whether the MAI should also cover investment via a third country which is not a party to the MAI, in particular because of concerns relating to companies without substantial business links. He suggested that DG3 consider whether a denial of benefits clause could meet these concerns.

#### National treatment and Most Favoured Nation Treatment

There is agreement that National treatment and most-favoured-nation treatment are to be understood as being comparative terms. However, there is no consensus on whether the concept of "in like circumstances" should be explicitly mentioned in the text of the agreement. Some countries believe that the inclusion of "in like circumstances" might lead to abusive interpretation.

The Chairman suggested that Drafting Group N° 3 work on producing a very short interpretive note stressing the relative nature of National Treatment and MFN Treatment and hopefully obviating the need in the text for the expression "in like circumstances".

The Chairman also invited the Drafting Group to look at the Energy Charter Treaty, and any other proposal that these delegations might make in this connection.

#### General Treatment

Most bilateral investment treaties contain a general clause affording investor protection from government measures which are unreasonable or discriminatory. However, there is some concern that this might give foreign investors better than national treatment. Delegations discussed a possible compromise proposal but did not come to a final conclusion. The Chairman proposed that DG3 re-examine this proposal.

#### Expropriation and Compensation

Many delegations accepted the principle that the MAI should cover the risk of an exchange rate loss which arises from a violation of the MAI. There were different views as to how to calculate this risk as part of the compensation to be paid to the investor and how this relates to the right of free transfer. The Chairman thought the debate between freely usable currencies and freely convertible currencies was inconclusive because both imply disadvantages for the investor. He proposed that while governments calculate and make payments in their national currency, the investor should have the right to transfer the payment either in his own home currency, or in another currency acceptable to the investor.

The Chairman concluded that the three main issues - method of calculation (in case of delay of payment), the currency of payment, and the right of transfers - needed further study. DG3 was instructed to take up these issues in June or September.

## Controls and Formalities

Delegations remarked that this issue was about the right of a Contracting Party to require from a foreign investor routine information for statistical purposes and the obligation of a Party to protect confidential business information. There were different views whether the MAI needed to make specific provisions relating to special formalities. Some delegations thought that this discussion should not be related to transfers where the concerns were of a different nature and where it might be preferable to list these concerns in a very specific way.

The Chairman asked DG3 to examine a general provision on controls and formalities which would address concerns relating to transparency and confidentiality. The Drafting Group should also assess whether this clause would address the concerns raised with regard to the transfer of funds. The provision could be modelled on NAFTA's article 1111 and the OECD Liberalisation Codes' article 5.

## Protecting Investor Rights

The Negotiating Group considered the three options for dealing with rights arising from agreements between investors and states. The Chairman saw more support for option (iii) a substantive and procedural provision, i.e., a "respect clause" but noted that there were many questions raised about the legal implications of this option. Some delegations which preferred option (iii) might be ready to consider option (ii) as a compromise if it could be shown that that this option gave sufficient investor protection.

Many delegations thought that more time was needed to address this issue and the Chairman instructed the Expert Group on Dispute Settlement to examine the implications of options (ii) and (iii) particularly the question of any legal uncertainties which might arise.

## Non-applicability of general exceptions to compensation and protection from strife

The Chairman noted that a large majority of delegations felt that general exceptions should not apply to the investment protection provisions. He noted that further consideration of this might need to differentiate between situations of war and major conflicts and other situations. This issue should remain on the Negotiating Group's agenda to be taken up at a time to be determined later.

## Taxation

The Chairman thanked Expert Group N° 2 on Taxation Matters and its chairman, Mr. Revilla, for their report. He noted that while there was an emerging consensus on a "carve-out/carve-in" approach, many questions remain to be considered.

The Negotiating Group approved the revised mandate for Expert Group No. 2 (see Annex 4).

## Conflicting Requirements

The Negotiating Group discussed issues relating to extraterritoriality and how they might relate to the MAI. Conflicting requirements imposed on multinational enterprises and secondary investment boycotts aimed at investors may have a negative impact on investment and distort investment flows. The Chairman noted that measures of this kind are subject to existing obligations under the existing OECD instrument on general considerations and practical approaches on conflicting requirements but there was no consensus whether, and how, they could be addressed in the context of the MAI.

The Group decided that Expert Group N° 1 on Dispute Settlement review the existing OECD instruments on conflicting requirements at a September meeting and report back to the Negotiating Group by its October meeting. This review was added to the revised mandate of EG1 (see Annex 3). All other aspects and proposals on these issues would remain on the Negotiating Group agenda.

#### Dispute Settlement

The Group agreed that investor-state dispute settlement would enhance the effectiveness of the MAI. The Group discussed how to apply this general principle and the Chairman noted that the majority view was that investor-state dispute settlement should apply to all the obligations of the agreement. Obligations must be precise but then it is irrelevant whether the obligation relates to the pre or post establishment phase. Some countries were more cautious citing problems relating to sovereignty, or the possibility of frivolous claims, or compatibility with other dispute settlement mechanisms.

The Chairman recognised the close link between dispute settlement and the substantive obligations of the agreement and he agreed there was a need for further reflection on many of the concerns raised, as well as the relation of dispute settlement with general exceptions. However, he thought that there was sufficient progress to permit the drafting of texts on dispute settlement in parallel to the continued discussions on obligations. The Group adopted the revised mandate for the Expert Group on dispute settlement (see Annex 3) which is to develop texts starting with consultations/conciliation and state-state dispute settlement.

#### Measures affecting investment

The Group examined the inventory of measures affecting investment. It requested that the Secretariat prepare a systematic presentation of the measures identified in the analytical inventory classifying measures by type of restriction and by sector, and report to the Negotiating Group in October 1996.

## ANNEX 1

### MAI : Draft Agendas for October and December 1996

#### 24 - 25 October 1996

1. Report by DG3 on Definition, Treatment and Protection of Investors and Investments
2. Progress Report by EG1 on Dispute Settlement and Geographical Scope
3. Non-Discriminatory Barriers
4. Cultural Matters
5. Environmental Matters
6. Analytical inventory of investment measures

Lunch Topics (24 October)      Liberalisation: Approach and Package  
Labour matters

#### Drafting/Expert Groups

Oct 14-15	EG3 on Special Topics
Oct 16-17	EG5 on Financial Matters
Oct 18	EG4 on Institutional Matters
Oct 21-23	EG1 on Dispute Settlement and Geographical Scope
Nov 18-20	EG3 on Special Topics
Nov 21-22	EG4 on Institutional Matters

#### 18 (p.m.) - 20 December

1. Overview of the Agreement
2. Labour matters
3. Report by EG2 on Taxation Matters
4. Final Report by EG3 on Special Topics
5. Report by EG4 on Institutional Matters
6. Final Report by EG5 on Financial Matters
7. Liberalisation
8. [For Negotiation] Remaining Issues from DG3 on Definition, Treatment and Protection of Investors and Investments
9. [For Negotiation] Remaining Issues from EG3 on Special Topics

Lunch topics (19 December):      Organising the remainder of the negotiations  
Outreach to Non-Members

#### Drafting/Expert Groups

Dec 9-11(am)	EG2 on Taxation Matters
Dec 11(p.m.)-13	[To be decided]
Dec 16-18(am)	EG1 on Dispute Settlement and Geographical Scope

## ANNEX 2

### **TENTATIVE DATES FOR 1997**

January 22-31

February 24-28

March 19-27

April 16-25

## ANNEX 3

### **REVISED MANDATE FOR “EXPERT GROUP N° 1 ON DISPUTE SETTLEMENT AND GEOGRAPHICAL SCOPE”**

1. The Group, open to participation of all delegations, is charged with considering the relevant aspects of dispute settlement, taking account of discussions in the Negotiating Group especially regarding the scope of dispute settlement, under the following headings:
  - a. Consultation and Conciliation
  - b. State-to-State
  - c. Investor-to-State
  - d. Issues arising from the relationship between the MAI and other international agreements, including the WTO agreements.
2. The Group will also consider
  - a. The geographical scope of the agreement
  - b. Issues arising from the consolidated text on the definition and treatment of investors and investments, taking account of guidance provided by the Negotiating Group, in particular the options for dealing with the issue of the protection of investor rights.
  - c. The general question of implementing international treaties in national law.
3. The Group will make proposals, including proposals for text wherever possible.
4. The Group will make a progress report to the Negotiating Group in October 1996 and a final report in December 1996.
5. The Group will review the existing OECD instruments on conflicting requirements at a September meeting and report back to the Negotiating Group by its October meeting.
6. The Group's Mandate will terminate after its report to the Negotiating Group, unless the Negotiating Group decides otherwise.

Chair: Mr Marino Baldi (Switzerland)

ANNEX 4

**REVISED MANDATE FOR EXPERT GROUP NO. 2 ON THE  
“TREATMENT OF TAX MEASURES IN THE MAI”**

1. The Expert Group, open to participation of all delegations, is charged with examining all matters relating to the treatment of tax measures in the MAI.
2. The Group will meet in October and December. On the basis of a “carve-out”/“carve-in” approach which is the subject of an emerging consensus, the Group will make proposals, including proposals for text whenever possible, to address the treatment of tax measures in the MAI.
3. The Group will make a progress report to the Negotiating Group in October 1996 and a final report in December 1996.
4. The Group’s Mandate will terminate after its Report to the Negotiating Group, unless the Negotiating Group decides otherwise.

Chair: Mr Eduardo Revilla (Mexico)

Vice Chair: Ms Mary Ryckman (United States)