



Negotiating Group on the Multilateral Agreement on Investment (MAI)

**AIDE MEMOIRE OF THE MEETING OF THE NEGOTIATING GROUP
ON THE MAI HELD ON 18-20 DECEMBER 1996**

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The Chairs of Drafting Group 3 and Expert Groups 1, 2, 3, 4 and 5 presented the results of their Groups' work. They noted the progress made and highlighted some of the outstanding issues.

The Chairman of the Negotiating Group welcomed these reports and noted that there is still more work to be done. It would therefore be necessary to revise the mandates for Drafting Group 3, Expert Group 2, Expert Group 3, and Expert Group 5 (see item 11, below). He noted that EG4 and EG1 were scheduled to meet in January and February, respectively, to conclude their previous mandates.

One delegation presented its contribution setting out a proposal for an MAI clause dealing with measures taken by members of Regional Economic Integration Organisations (REIOs).

Acknowledging the importance of this issue and noting the stated intention to draw a narrow carve-out for REIOs, some delegations expressed concerns about the appropriateness of advancing liberalisation among REIO members but denying it to other MAI Parties. Other countries felt that this clause could undermine the multilateral legal framework of the MAI intended to create a non-discriminatory environment for inward and outward FDI. There were questions regarding terminology and the implications of some proposed language which seemed imprecise or overly broad. Some delegations also noted the lack of a process of scrutiny, i.e., ensuring transparency through notification, consultation, or examination. Some delegations expressed serious concern over the inclusion of a carve-out for REIOs and pointed out that if there were such a carve-out appropriate payment would be required.

The Chairman concluded that this issue required further consideration, particularly those questions relating to the definition of a REIO, the purpose of a REIO clause, and the procedural guarantees for transparency. He felt that these problems were not insoluble given the experience of such clauses in other agreements.

The Negotiating Group considered whether it would be appropriate to include specific provisions pertaining to labour matters in the MAI. Delegates agreed that this issue was sensitive and could impact on many aspects of the negotiations.

Several delegations felt that it would be inappropriate to include any provisions on labour standards in the MAI since there are other international organisations, such as the ILO, responsible for the setting and enforcement of labour standards.

However, the Chairman concluded that a clear majority was in favour of addressing labour matters in the MAI through a package of provisions consisting of the following:

a) a statement in the preamble similar to one in the Singapore Ministerial Declaration, which reiterates Parties' "commitment to the observance of internationally recognised core labour standards" established by the ILO together with a possible reference to the OECD Guidelines for Multinational Enterprises;

b) a specific provision along the lines of paragraph 2 of Article 1114 of the NAFTA stating that Parties should not relax domestic core labour standards in an effort to encourage foreign investment;

c) association of the OECD Guidelines with the MAI, with the Guidelines retaining their non-binding character and allowing for their amendment in an appropriate way after the MAI enters into force.

The Chairman cautioned that in doing so, the MAI should not attempt to define what is meant by core labour standards but should rely on internationally accepted language and existing standards. The Group agreed to refer the choice of appropriate language concerning a) and b) to DG3. It was noted that EG4 had already been requested to consider the manner in which the OECD Guidelines should be associated with the MAI and was scheduled to submit proposals for the next meeting of the Negotiating Group.

The Chairman remitted the issue of the coverage of indirect investment under the MAI to an informal working group which provided a brief summary of the results of its discussions. There was a broad consensus that further clarification of what was meant by "control" would be necessary. Delegations confirmed that certain cases of indirect investment would be covered with or without reference to the "control" theory but that there may be a need for a denial of benefits clause.

Consensus on another type of indirect investment was more difficult as several delegations made clear that their positions were based, at least partially, on non-technical considerations. Nevertheless, there was full agreement that standing for dispute settlement in both state-state and investor-state should be limited to MAI Parties and investors.

The Chairman noted that a large majority were in favour of having no explicit provision in the MAI addressing the issue of losses from currency fluctuations. However, to respond to the concerns of some countries that this approach might lead to uncertainty, the MAI could contain an interpretative note providing that in the case of undue delay in the payment of compensation on the part of a Contracting Party, any exchange rate loss arising from this delay should be borne by the host country.

The Chairman noted that countries were ready to accept a provision to take account of the concerns addressed in the Transfers article. The Chairman invited those countries that are particularly interested in this subject to propose a text that would be acceptable to the Negotiating Group.

The Chairman concluded that there was not sufficient support for the inclusion in the article on controls and formalities of an additional paragraph which would cover certain residence requirements as part of formalities in connection with the establishment of investments.

The Chairman noted an emerging consensus according to which the MAI on the temporary entry and stay of key personnel would prevail with respect to national labour market or economic needs test and numerical restrictions. Many delegations were in favour of an anti-abuse clause but others cautioned against introducing this in the article itself.

As concerns the question of work permits for spouses, a majority could accept at least a best efforts commitment. The Chairman requested EG3 to report back to the NG on this issue in January.

The Chairman concluded that services should, in principle, be covered by MAI obligations on performance requirements; this would constitute a major breakthrough given that the TRIMS Agreement applies only to goods. A few delegations, while not contesting the principle of inclusion of services, wished to reserve their position pending a better understanding of the possible implications with regard to the GATT Subsidies Code and the Government Procurement Agreement or the coverage of

country-specific sectoral reservations. One delegation maintained a general reservation on the inclusion of services.

The Chairman invited delegations to reflect further on these matters with a view to finalising their position at the January 1997 meeting of EG3.

The Chairman concluded that there is broad agreement that the National Treatment, MFN and Transparency obligations of the MAI would apply to both initial and subsequent sales associated with a privatisation operation. Special share arrangements that explicitly discriminate against foreign investors and their investment shall be regarded as inconsistent with these obligations and would need to be covered by country-specific reservations. There could be merit in confirming these understandings, for example, in a separate article.

The Chairman also concluded that other special share arrangements which do not involve de jure discrimination could give rise to problems of de facto discrimination. Most delegations considered, nevertheless, that this matter should be addressed through the normal consultations and dispute settlement provisions in the MAI and that no special consultations procedures were needed; another view, held by one delegation, is that all share arrangements which carry a potential of discrimination should be covered by country-specific reservations.

EG3 should pursue its work taking into account the views expressed as well as the concerns raised by one delegation with respect to retroactivity of MAI provisions on privatisations which have already been concluded and by another delegation with respect to the applicability of the MAI to voucher privatisation programmes.

The Chairman concluded that many delegations were hesitant to engage at present in detailed consideration of competition aspects of government-designated monopolies although some saw this as a matter for an in-built agenda after the conclusion of the MAI. Reference was made to precedents from other international agreements in particular Article VIII of the GATS which could be taken into account in drafting a provision for the MAI. There was agreement to continue consideration of these issues in the margins of the next meeting of the Negotiating Group, if possible, with the participation of competition experts.

As to the lodging of new country-specific reservations in the context of future demonopolisations, the Chairman concluded that the preliminary reaction of several delegations was not favourable. This matter has not, however, been sufficiently discussed to reach a definite conclusion. Advice of EG3 is therefore required.

The Chairman concluded that work should be continued on the assumption that National Treatment, MFN and transparency would apply to investment incentives. Even if this is not necessary in legal terms it would be desirable to record the application of these disciplines to investment incentives in a specific article of the MAI.

Many delegations supported further work on developing disciplines addressing positive discrimination by investment incentives or at least including this issue in an in-built agenda. Other delegations doubted the feasibility and desirability of this approach.

One delegation emphasised that its support of this approach was prefaced on the assumption that tax measures are carved-out, and that, as with other measures, country-specific exceptions were permitted.

EG3 is charged to continue discussions on this subject and report back to the January meeting of the Negotiating Group.

The Chairman concluded that there is full agreement that government-imposed discriminatory practices would be covered by the MAI. In view of the views expressed by a clear majority of delegations, the MAI should not contain disciplines on non-government imposed discriminatory corporate practices. However, Contracting Parties to the MAI should follow future developments in this area and could take up the matter again if the need arises.

While noting this was an accurate reflection of the opinion in the meeting, one country maintained its view that the MAI should also contain disciplines on non-government imposed discriminatory corporate practices.

The Chairman outlined his proposals for organising the rest of the negotiations in order to move forward on completion of the MAI texts and to achieve the MAI liberalisation objectives. He proposed to combine plenary sessions of the Negotiating Group with informal groups working on specific issues and drafting solutions. On country specific reservations, he encouraged countries to take part in bilateral consultations on their list of proposed reservations, however, all results of bilateral consultations should be vetted at the Negotiating Group level.

This method requires a shift away from the Drafting/Expert Groups to more intensive activity of the Negotiating Group itself. In May, or possibly earlier, the Negotiating Group will reserve the entire week of meetings for itself.

On the basis of the discussion, the Chairman concluded that there was broad support for the working method he had proposed. The Bureau would be responsible for maintaining transparency of the process and the results.

Specifically on the reservations, the Chairman thought that peer pressure and request/offer approaches could be combined for maximum efficiency. He requested delegations to provide their list of proposed reservations to the Secretariat. The Negotiating Group will examine the lists on the occasion of its February, March and April meetings. These discussions should result in an agreed list of reservations for all countries.

One delegation representative presented proposals on Secondary Investment Boycotts and Conflicting Requirements.

The Chairman was of the opinion that this important issue required further discussion. He was encouraged that some delegations were engaging in constructive dialogue and had expressed optimism about the prospects for co-operation in this area. He thought that informal meetings could help further clarify country positions and agreed that the Negotiating Group return to this issue shortly.

The Group approved the draft agendas for 29-31 January 1997 and for 26-28 February 1997 [DAFFE/MAI/RD/(96)58]. The agendas are attached as Annex 1.

A tentative list of meetings for 1997 is attached as Annex 2.

The Group approved revised mandates for Drafting Group 3 on Definition, Treatment, and Protection of Investors/Investments (Annex 3), Expert Group 2 on Taxation (Annex 4), Expert Group 3 on Special Topics (Annex 5), and Expert Group 5 on Financial Matters (Annex 6).

Annex 1

MAI Draft Agendas for January and February 1997

29(pm) - 31 January 1997

1. Reports by Expert Groups
 - a. DG3 on Definition, Treatment and Protection of Investors and Investments
 - b. EG3 on Special Topics
 - c. EG4 on Institutional Matters
 - d. EG5 on Financial Services Matters
2. Definition of Investment
3. General Exceptions
4. Dispute Settlement
 - a. Scope and Application
 - b. Selected other issues
5. Selected Issues from EG4 on Institutional Matters
6. Conflicting Requirements and Related Matters

Lunch topic: (30 January): Measures taken by sub-national governments
Selected Issues for Negotiation

Drafting/Expert Groups

Jan 24	EG4 on Institutional Matters
Jan 27-29(am)	EG3 on Special Topics
Jan 27-29(am)	EG5 on Financial Services Matters
Jan 28-29(am)	DG3 on Definition, Treatment and Protection of Investors and Investments

26 (pm) - 28 February 1997

1. Reports by Expert/Drafting Groups
 - a. DG3 on Definition, Treatment and Protection of Investors and Investments
 - b. EG1 on Dispute Settlement
2. Selected Issues from EG3 on Special Topics
3. Liberalisation and the lodging of country specific reservations
4. [Other Topics to be added following the January meeting]

Lunch topic: Selected Issues for Negotiation

Drafting/Expert Groups

Feb 24-26(am)	EG1 on Dispute Settlement
Feb 24-26(am)	DG3 on Definition, Treatment and Protection of Investors and Investments

Annex 2

MAI Meeting Schedule

March

13-14 EG5 on Financial Services Matters
19-21 EG2 on Taxation Matters
24-27 Negotiating Group (and Drafting Groups as necessary)

April

21-25 Negotiating Group (and Drafting Groups as necessary)

May

12-16 Negotiating Group

Annex 3

REVISED MANDATE FOR DRAFTING GROUP N° 3 ON THE “DEFINITION, TREATMENT AND PROTECTION OF INVESTORS AND INVESTMENTS”

1. The Drafting Group, open to participation of all delegations, is charged with preparing proposed solutions to the outstanding issues in the consolidated texts and commentaries, particularly with respect to the definition of investor and investment taking into account the advice of Expert Group N° 5 on Financial Services Matters.
2. The Group will make proposals, including text where appropriate, on issues concerning intellectual property, including artistic and literary property.
3. The Group is charged with preparing draft text for a preamble to the MAI.
4. The Group is also charged with preparing draft text for a provision which calls for MAI countries not to lower standards in order to attract investment.
5. The Group will meet in **January** and February. It will report to the Negotiating Group on **the definition of investment** at its session in **January 1997**, and on items 2, 3 and 4 in February 1997.
6. The Group will terminate after its February Report to the Negotiating Group, unless the Negotiating Group decides otherwise.

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. **On the basis of the “carve-out/carve-in” approach, the Group will make proposals, including proposals for text wherever possible.**
3. **The Group will meet in March 1997 and report to the Negotiating Group in March 1997.**
4. The Group’s mandate will terminate after its Report to the Negotiating Group, unless the Negotiating Group decides otherwise.

Annex 5

REVISED MANDATE FOR EXPERT GROUP NO. 3 ON “SPECIAL TOPICS”

1. The Expert Group, open to participation of all delegations, is charged with preparing specific proposals including, where possible, text on each of the following "special topics":
 - a. Key Personnel
 - b. Performance Requirements
 - c. Privatisation
 - d. Monopolies/State Enterprises/**Concessions**
 - e. Investment Incentives
2. The Group will also examine issues relating to:
 - a. Research and Development/Technology
 - b. Non-discriminatory barriers (“market needs” tests)
3. **The Group will meet in January 1997 and report to the Negotiating Group at its January session on:**
 - a. **Further progress on the topics listed in paragraph 1; and**
 - b. **The results of its consideration of the topics listed in paragraph 2.**
4. The Group will terminate after its January Report to the Negotiating Group, unless the Negotiating Group decides otherwise.

Annex 6

REVISED MANDATE FOR EXPERT GROUP N° 5 ON “FINANCIAL SERVICES MATTERS”

1. The Expert Group, open to participation of all delegations, is charged with examining the treatment of financial services matters in the MAI, and **making proposals, including proposals for text where appropriate.**
2. **The Group will:**
 - a. **finalise advice to Drafting Group N° 3 with respect to the definition of investment;**
 - b. **consider the need for general safeguard provisions, particularly with respect to the balance of payments, taking account of the role of the International Monetary Fund; and**
 - c. **complete its work with respect to issues specific to, or particularly important for, financial services.**
3. The Group will **meet in January and March 1997 and** report to the Negotiating Group **with respect to the topics in paragraph 2 a. and b. in January, and with respect to the topics in paragraph 2 c. in March 1997.**
4. The Group's mandate will terminate after its report to the Negotiating Group, unless the Negotiating Group decides otherwise.