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

**AIDE MEMOIRE OF THE MEETING OF THE NEGOTIATING GROUP  
ON THE MAI HELD ON 6-8 DECEMBER 1995**

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The Negotiating Group on the MAI met on 6-8 December 1995. The Group discussed the geographical scope of application of the MAI and identified two aspects to this issue; one that concerns the application of the MAI to a Party's overseas territories and a second aspect relating to the extension of MAI obligations to investments in the Exclusive Economic Zone (EEZ) and the continental shelf over which coastal states have sovereign rights. Those delegations that are directly concerned by the first issue indicated that they would need the possibility of indicating in the MAI the extent to which the agreement would be applicable to their overseas territories.

The discussion focused on the question of whether the geographical scope of the MAI should cover the EEZ and the continental shelf. Most delegations thought that it would be important for investors if coastal states, parties to the MAI, with sovereign rights for economic activities in the EEZ and the continental shelf, would take on MAI obligations also in these areas. Many BITs, NAFTA, and the ECT provide that the obligations of the agreement apply to the EEZ and the continental shelf. Other delegations cautioned that there was nevertheless a possibility of conflict, or uncertainty, as concerns the concept of territory under international law.

On the issue of overseas territories, the Chairman concluded that the MAI would probably include a specific provision for those countries that need to clarify the application of the MAI to these territories citing the ECT as a possible model. As to the geographical coverage of the MAI, the Chairman indicated that there was a general consensus that the MAI should have as wide as possible a geographical application, including sovereign territories and investments in the EEZ and the continental shelf. The legal question of how to do this without conflicting with international law conventions should be studied further, but the Chairman thought that a clause of general application would be preferable to a case-by-case approach.

The Group concurred with the Chairman's assessment that this question should be referred to a group of experts, including law of the sea specialists as part of delegations, which would study the implications of providing for the widest possible application of the MAI.

The Negotiating Group had a second round of discussion on the *treatment of investors and investments* [see Aide Memoire DAFPE/INV/IME(95)47]. The Group reaffirmed that a *general exceptions* provision in the MAI will most likely include exceptions based on national security interests. This is a well-known feature of international agreements and, when narrowly interpreted, relates to actions by a country to ensure the defence and safety of the state. Delegations noted that while there is necessarily a certain degree of "self-judgement" regarding such measures, it would be incumbent on the MAI to include procedures to control abuse. Delegations identified the examination and review techniques which exist under the present OECD instruments, including clarifications which limit the scope of the concept, as particularly pertinent. Others wished to examine the possibility of using dispute settlement procedures or submission to a "Parties Group".

Some Delegations expressed concern that a general exceptions provision which did not refer to measures taken to preserve international peace and security might create uncertainty as to a country's international obligations arising under the UN Charter. Others thought these obligations were unaffected by whether or not the MAI refers to them explicitly, but felt that the exception might be needed for actions not linked to UN Charter obligations and which could be justified as relating to international peace and security. Some countries argued that public order should also be included as part of the general exceptions provision. Not all delegations were convinced by the need for measures of this kind which would discriminate against foreign investors.

The Chairman's summary noted the agreement that national security exceptions, narrowly interpreted and subject to controls to be defined, should be included in a general provision. International peace and security also seemed to be a concept which needed to be included, because it could be broader than just UN charter obligations. But here too, the concept should be narrow and perhaps confined to specific sectors. Whereas there is still more diversity of opinion as concerns public order measures, the Chairman thought that it could not be eliminated at this point. The Group agreed with the Chairman's proposal that the Drafting Group on the treatment of investors and investments be asked to draft a general exceptions provision taking account of the discussion, and of the need to provide for adequate monitoring and review of such measures.

The Group also discussed the principles which could apply to *country specific reservations*. The Chairman noted that some countries said that they could not commit to a firm standstill on all new measures since they would wish to retain flexibility in certain sectors (culture, for example). The principles of no exceptions to MFN and no exceptions in the post-establishment phase might also need to accommodate the situation of some Member countries. Reciprocity measures could be excluded except for certain sectors where bilateral arrangements predominate. While it would be unrealistic to expect that all country reservations will be temporary, techniques should be developed to roll back reservations over time.

In summary, the Chairman noted that the discussion should help the drafting group in its task of deciding how to reflect them in the MAI. The Group agreed to ask the Drafting Group on the treatment of investors and investments to consider mechanisms for standstill, rollback, and the listing of country reservations.

On considering the question of **temporary derogations** in the MAI, the Negotiating Group heard a detailed presentation by the representative of the IMF who explained the Fund's position concerning the interface between the MAI and the IMF agreement. The representative stated that under the current Articles of Agreement, an IMF Member may impose temporary restrictions on current payments and transfers provided that the IMF Board agrees that the restrictions are necessary, temporary, and non-discriminatory. Capital account restrictions do not require Fund approval, although the Articles of Agreement are under review and could eventually extend the Fund's jurisdiction to cover the capital account.

Several delegations said that they would be prepared to forego these rights in the MAI in the interests of providing greater investment protection for the investor and that they do not generally include temporary derogation clauses in their bilateral treaties. Other delegations could align themselves with this position but might have to re-consider depending on how broadly investment was defined under the MAI. The Group noted the IMF's concern that the absence of a derogation clause in the MAI could negatively affect the Fund's ability to manage the financial difficulties of Parties to the MAI by limiting the instruments available to redress the situation.

The Chairman stated that he did not sense a strong consensus on this issue. Whereas many countries spoke out against a BOP derogation because of the risk of abuse, or because of the risk of a diversion of investment, others were more cautious and thought it better to reconsider the matter when a definition of investment under the MAI had been agreed. There was agreement, however, on the need for consistency in legal and policy objectives and if there was no legal impediment to dispensing with a BOP derogation in the MAI, the policy implications were still to be fully considered.

The Group agreed that it was not necessary to decide now on whether the MAI would include a BOP derogation. It would be preferable that further progress is made on the major substantive elements of the MAI in particular the definition of investment.

The Group noted the *Report by the Drafting Group on selected issues concerning investment protection*. It welcomed the progress made with respect to agreed texts on the general standard of treatment, compensation in the event of expropriation, protection from strife, free transfer of funds and subrogation. It also noted that most of the questions remitted to the Negotiating Group related to other matters in the agreement which had not yet been finalised. The question of the exchange rate risk in connection with compensation for expropriation was identified as one where guidance was needed from the Negotiating Group. The Group agreed to terminate the Drafting Group's activities, in accordance with its mandate.

The Group agreed that *dispute settlement* is an important element for implementation of the MAI obligations and that the mechanism should be simple, clear, effective, and efficient. There was consensus that the MAI could provide for informal, non-binding *consultation and conciliation*, limited in time (3-6 months). Questions needing further study included whether consultation and conciliation should be a mandatory step before pursuing state to state or investor to state dispute settlement and the modalities, including whether consultation and conciliation should take place in the Parties' Group.

The Group agreed that all of the MAI obligations (pre and post establishment) could, in principle, be subject to *state/state dispute settlement*. There could be a role for a Parties' Group as either an alternative or a prelude to more formal arbitral proceedings; however it is necessary to examine more closely how this would operate in practice. The MAI should develop its own procedural rules but these should be based on existing models (e.g. UNCITRAL).

There were divergent views as to whether the MAI should specify the remedies that an arbitral tribunal might decide, although all delegations spoke in favour of providing for remedies that were consistent with national legal systems. Measures to enforce arbitral proceedings could be contained in the MAI or reference could be made to existing conventions for the enforcement of arbitral awards. It needs to be studied whether sanctions similar to those used in the WTO and used in the NAFTA and GATS - retaliation, suspension of equivalent benefits - would be appropriate in an investment agreement.

The Chairman noted that the effectiveness of the MAI would be enhanced by providing for *investor-to-state dispute settlement*. There were, however, different views on how to apply this general principle. Some delegations thought that investors should have the maximum choice of options including the possibility of bringing disputes with a host country on pre-establishment obligations under the mechanism. Others wanted to reserve pre-establishment disputes to the state-to-state mechanism. Many thought that in any case it should be limited to MAI obligations although there might be a case for bringing specific commitments made by a state in an investment agreement within the ambit of the MAI.

The MAI could rely on existing arbitral regimes (ICSID, UNCITRAL) but needs to make reference to these procedures. The MAI should provide for conciliation procedures, preferably not mandatory but if so, then with a short (3-6 months, maximum) period to permit "cooling-off".

The Chairman noted that there was some concern that the MAI dispute settlement regime not undermine national legal systems. While most countries said it would not be necessary to provide for the exhaustion of local remedies before pursuing international arbitration, parallel procedures where arbitral rulings might clash with national law should be avoided. Delegations are split as to whether the investor should, at some time, be obliged to choose between local, or international arbitration (fork in the road) as can be seen from the way this issue was resolved in the ECT.

Delegations agreed that the MAI might allow for more than just monetary awards but there should also be some flexibility by the arbitral tribunal to agree on remedies on a case by case basis. Ensuring compliance with arbitral decisions was an important element for effective dispute settlement, but delegations wanted to study which remedies would be most appropriate in an investment agreement and how the MAI should provide for them.

In light of the discussion on dispute settlement, the Chairman proposed to set up an experts group which would explore the arguments in more detail and clarify the options available. Accordingly, the Negotiating Group decided to create the Experts Group on selected issues concerning dispute settlement and geographical scope (see below).

The Group approved the draft *agendas for 25-26 January 1996 and 14-15 March 1996* (see Annex 1). The meetings would be scheduled for two full days each time.

The Negotiating Group adopted the revised mandate for Drafting Group 2 on selected topics concerning the treatment of investors and investment (Annex 2) and noted that it would meet on 22-24 January and on 11-13 March.

The Negotiating Group approved the mandate of the new Expert Group on selected issues concerning dispute settlement and geographical scope as set out in Annex 3 which would be chaired by Mr. Baldi (Switzerland). The Group would have its first meeting on 29-31 January. The Negotiating Group agreed that ICSID should be invited as an observer to the Expert Group's meeting.

A tentative list of meetings for 1996 and 1997 is provided in Annex 4.

## ANNEX 1

### Revised Draft Agenda for January 1996

25-26 January

1. Taxation
2. Definition of Investor and Investment
3. Special topics:
  - a. Key personnel
  - b. Performance requirements
  - c. Incentives
  - d. Technology/R&D
4. Protecting Investor Rights arising from other agreements

### Draft agenda for 14-15 March

1.
  - a. Report by Drafting Group on Treatment Issues
  - b. Market Access Issues
2. Follow-up to the Report by DG1 on Investor Protection issues
3. Special topics:
  - a. Privatisation
  - b. Monopolies/state owned enterprises
  - c. Corporate Practices
4. Implementing the Agreement ("Parties Group")

## ANNEX 2

### REVISED MANDATE OF THE DRAFTING GROUP ON

#### "SELECTED TOPICS CONCERNING 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 treatment of investors and investment (pre/post establishment).
2. Topics:
  - a. National Treatment
  - b. Non-discrimination/MFN
  - c. Transparency

National Treatment and Non-discrimination/MFN should be defined in full and unconditional terms.
3. Following the guidance received from the Negotiating Group at its meeting on 6-8 December 1995, 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 general exceptions concerning public order, national security, and international peace and security.
5. The Group will report to the Negotiating Group at its March 1996 session and submit proposals, including proposals for text, in accordance with its mandate.
6. The Group will terminate after this report has been made, unless the Negotiating Group decides otherwise.

ANNEX 3

MANDATE FOR AN EXPERT GROUP ON

"SELECTED ISSUES CONCERNING DISPUTE SETTLEMENT AND GEOGRAPHICAL SCOPE"

1. The Expert Group, open to participation of all delegations, is charged with drafting specific provisions on the geographical scope of application of the agreement.
2. The Expert Group is also charged with considering the relevant aspects of dispute settlement under the following headings:
  - a. Consultation and Conciliation
  - b. Investor-to-State
  - c. State-to-State
3. The Group will report to the Negotiating Group in April 1996, and submit proposals, including proposals for text, in accordance with its mandate.
4. The Group will terminate after this report has been made, unless the Negotiating Group decides otherwise.

## ANNEX 4

### JANUARY 1996

22-24	Drafting Group on Treatment of Investors/Investment
25-26	Negotiating Group
29-31	Expert Group on Dispute Settlement and Geographical Scope

### TENTATIVE DATES FOR REMAINDER OF 1996

March 7-8 [dates to be confirmed]	Expert Group on Dispute Settlement and Geographical Scope
March 11-13	Drafting Group on Treatment of Investors/Investment
March 14-15	Negotiating Group
April 15-19	
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