



Negotiating Group on the Multilateral Agreement on Investment (MAI)

SUMMARY RECORD

Meeting on 18-19 April 1996

NEGOTIATING GROUP ON THE MULTILATERAL AGREEMENT ON INVESTMENT

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1. Adoption of the Agenda

The Group adopted the agenda [DAFFE/MAI/A(96)3].

2. Approval of the Summary Record of the meeting held on 14-15 March 1996

The Group approved the Summary Record [DAFFE/MAI/(96)2].

3. Report by Drafting Group 2 on the definition of investors and investments

The Drafting Group reported that important progress had been made [DAFFE/MAI/DG2(96)3]. It noted however that many technical issues had been raised which had not been fully examined for want of sufficient time and that the application of broad definitions would require further work. The report contains draft text with some square brackets and extensive commentaries.

The Chairman expressed appreciation for the work by DG2 and its chairman, Mr. Hantke. Reflecting the widely shared view of the Drafting Group that additional progress could not be made without looking at how the definitions interrelate with other issues, the Chairman proposed that this report be considered jointly with the other reports from DG1 and DG2 at the Negotiating Group's meeting in June.

4. Report by Expert Group 1 on Dispute Settlement and Geographical Scope

The Expert Group's report [DAFFE/MAI/EG1(96)5] addressed the application of the MAI to overseas territories; the geographical scope of application of the MAI; and a conceptual framework for dispute settlement. Some issues were well advanced but others would require further guidance from the Negotiating Group. In particular, the scope of the MAI dispute settlement provisions had not yet been considered, and in the opinion of several delegations it would not be possible to advance further on the dispute settlement issues until that question had been fully debated at the level of the Negotiating Group.

The Chairman concluded that more progress was needed on other elements of the agreement before the Expert Group should be asked to resolve outstanding issues. He proposed to defer consideration of the elements set out the Expert Group's report until after the June meeting of the Negotiating Group at which time there would be a discussion on issues arising from integrating DG1 and DG2 reports.

The Negotiating Group thanked Mr. Baldi and the members of the EG1 for their report.

5. Progress Report to Ministers

The Negotiating Group approved a progress report to Ministers [DAFFE/MAI(96)14/FINAL] describing the status of the negotiations so far and highlighting the issues which still must be resolved.

The report invites Ministers to reaffirm their determination to reach an agreement by Spring 1997 and will be forwarded to the OECD Council meeting at Ministerial level on 21-22 May 1996. It is available as a General Distribution document OECD/GD(96)78.

6. Application to different levels of government

The Chairman opened the discussion calling attention to the notes by the Chairman [DAFFE/MAI(96)11] and by one delegation [DAFFE/MAI/RD(96)20].

Delegations remarked on the political sensitivity of this issue and agreed that it is central to the question of the overall balance of commitments in the agreement. Recent international agreements recognise that federal countries may not always be in a position to control areas which are under the competence of subnational authorities and provide for dispute settlement in the event that reasonable or necessary measures have not been effective. Several countries were of the opinion that certain aspects of this issue, for example, enforcement of obligations, apply to both unitary and federal states and will have to be addressed when the scope of the agreement and the nature of the dispute settlement mechanism are concluded. Questions relating to the application of provisions on exceptions, rollback, and standstill should be considered broadly and not treated as a separate discussion.

The Chairman thought that the interventions of several federal states were particularly of interest: One delegate recalled the position of his government that, provided the MAI is an agreement that contains substantial new liberalisation and an adequate balance of commitments, it would be prepared to bind the subfederal entities to the obligations of an MAI. In another country, the MAI would need to be approved by Parliament and in that case would be formally binding on the subfederal entities. One delegation noted that different solutions may be needed for different countries according to their constitutional system. While the authorities of this country are actively pursuing possible mechanisms designed to secure agreement of its states in relation to the MAI commitments, they could not give any guarantees as to the outcome of these consultations. One other delegation stated that the central government is regularly consulting its subfederal entities on the progress of MAI negotiations. Whether this country, including its subfederal entities, will be bound by MAI obligations will depend on whether the balance of rights and obligations confers an overall net benefit to the country and to its constituent parts. One other country will have to consult and obtain the prior consent of its subfederal entities prior to its signing the MAI, but these regions would then be formally bound. One delegation cited the commitment in the NAFTA that all necessary measures should be taken by the central government to give effect to the provisions of the agreement at all levels of government. A similar commitment should be part of the MAI and federal states should engage in intensive dialogue with their states and provinces to encourage this observance.

The Chairman stated that the responses of federal states indicated that they were convinced of the crucial nature of this issue. While definitive solutions could not be found yet, the Chairman proposed the following steps to further understanding of this issue:

- (i) One of the existing drafting groups could be mandated to look into the issue of how the language relating to the application of the agreement at all levels of government could be

drafted. This would be decided after the June meeting of the Negotiating Group when it will consider the issues arising from the consolidated reports of DG1 and DG2.

- (ii) More generally, the implementation of international treaties in national law needs further examination. This discussion could take place in Expert Group 1 based on a paper by the Secretariat analysing the issues. The Expert Group would then report back to the Negotiating Group.
- (iii) An important confidence building measure would be to engage in a periodic exchange of information in the Negotiating Group on the consultation process between subnational levels of government and central government authorities and the progress of those talks.

7. Measures taken in the context of regional economic integration organisations

The discussion was based on the Chairman's note [DAFFE/MAI(96)12] and on the paper by the one delegation [DAFFE/MAI/RD(96)21]. The delegation stated that in seeking a REIO clause for the reasons set out in the paper, it would propose the application of certain principles to ensure that the clause is not an escape from MAI obligations. These principles include limiting the scope of the clause to that needed to cover the special requirements of the REIO and its members and applying certain criteria to determine which agreements would fall under the clause. The specific language of a clause will have to wait until the MAI obligations are decided.

For a considerable number of delegations, this issue also relates to the question of a balance of commitments in the MAI and has legal and confidence building implications as well. Further consideration will have to be given to the question whether the MAI should include a REIO clause but delegations welcomed one delegation's statement that there is no intention of erecting new barriers and that a REIO clause would be limited to MFN exceptions. All the same, there was concern with the possibility that a growing number of regional organisations would claim similar exceptions from MFN.

The Chairman noted these concerns and thought that the search for a solution should be guided by the goal of achieving a high standards agreement. The Chairman was of the opinion that the debate had helped clarify the issue, especially the policy rationale that underlies the importance that the delegation attaches to a REIO clause. He did not think it possible now to reach any conclusions as to the inclusion, or not, of a REIO clause nor as to its potential scope.

Taking up the suggestions of some delegations, the Chairman agreed that Expert Group 1 could include the REIO in its study of the issues relating to the implementation of international agreements in national law (see item 6, above). He supported the proposal that the delegation should make available factual information on existing restrictions to investment in areas where the investment related rules of the REIO are applicable. This would complete the inventory of FDI measures being complied by the CIME/CMIT (see item 9, below).

8. Accession of non-Member countries

The Chairman invited comments on his note [DAFFE/MAI(96)13] as well as on the written contribution by one delegation [DAFFE/MAI/RD(96)22].

There was clear consensus that outreach is a key for disseminating information on the MAI and making the process more open and transparent. Delegations emphasised the need to strike the right balance between communicating with non-Members and the goal of reaching an agreement by the 1997 Ministerial meeting.

Outreach. While noting different views on approach and timing, the Chairman could see common ground on the idea of making outreach activities more concrete and structured. The Negotiating Group Bureau was willing to engage in more frequent and in-depth briefings with interested non-Member countries on the occasion of Negotiating Group meetings. As more information becomes available and more opportunities are seized to discuss substantive issues with non-Members, it is likely that a process of "self-selection" will take place among those that are the most interested and eager to join the agreement. Apart from special and ad hoc meeting activities, information could also be disseminated through making available the notes by the Chairman for Negotiating Group debates as well as the aide-memoires of the meetings. Non-Members could be invited also to present written comments on any of these issues. This could provide an effective vehicle for substantive exchanges of views which would be mutually beneficial in preparation for accession.

Accession. There were different views on the question of the right time to engage with non-Members on discussions for accession. However, the Chairman noted broad consensus that accession to the MAI should be open to any country willing and able to meet the obligations and that there should be no additional criteria for membership. There is still the necessity to define the standards for participation, perhaps on the basis of a set of "core" principles or conditions and a level of reservations that would be comparable to that of the Parties. Transition periods to allow non-Members to accede without fully applying all the rules could be considered.

The Negotiating Group should study the feasibility of setting up an expert group to define the "standards", or minimum requirements for accession. This group could also examine the general accession principles that could be included in the MAI and the more detailed rules which could be left to a Parties Group to determine. Accession procedures, including voting rules (e.g., consensus/weighted majority), in other international agreements such as the WTO, could provide useful guidance, although the Chairman noted a preference for OECD-type consensus. The Chairman requested the Secretariat to collect information on the operation of non-application clauses in other agreements.

In addition, the Chairman endorsed the proposal by several delegations that an MAI group on accession be formed (timing still to be discussed) in order to closely liaise with non-Members and to prepare for further discussions on accession.

9. Report by CIME/CMIT on the Analytical Inventory of measures affecting investment

The Negotiating Group welcomed the preliminary Inventory of Investment Measures transmitted by the CMIT/CIME [DAFFE/MAI(96)15 and ADD1] in response to the request made by the Group in support of the MAI negotiating process and commended the Committees for their work. It noted nevertheless the CMIT/CIME delegates' wish to avail themselves of the possibility of revising the document to complete and harmonise country contributions as appropriate.

The Chairman proposed that the Negotiating Group postpone its discussion of the Inventory until its June 1996 session at which time it could take into account the latest information available and consider how analytical work might be carried forward.

10. Next Steps/Other Business

a. Agendas for June and September 1996

The Group approved the draft agendas for 19-21 June (beginning at 2:30 on the first day) and for 11-13 September (beginning in the afternoon of the first day). The agendas are attached as Annex 1.

b. Future meetings

A tentative list of meetings for 1996 and 1997 is attached as Annex 2.

c. Other Business

One delegation raised the issue of a possible cultural exception in the MAI in order to protect cultural industries from the obligations of the MAI. The Chairman noted the contribution by the delegation [DAFFE/MAI/RD(96)26] explaining the position of its authorities with regard to a cultural exception in the MAI. It was agreed to take up this matter at the Heads of Delegation lunch on 20 June.

ANNEX 1

MAI: Draft Agendas for June and September 1996

19 (2:30 pm)-21 June 1996

1. Issues raised by reports by DG1 and DG2 on:
 - a) Definition of Investors and Investment
 - b) Investment protection issues, including protection of investor rights
 - c) National Treatment, MFN Treatment and Transparency
 - d) General Exceptions (National Security, Public Order, International Peace and Security)
 - e) Standstill, Rollback and Listing of Country Specific Reservations
 - f) Controls/Formalities and Information Requirements
2. Report by EG2 on Taxation matters
3. Conflicting requirements and secondary investment boycotts
4. Scope of dispute settlement (pre/post establishment)

Lunch Topic (20 June): **Cultural matters**

Drafting/Expert Groups

22 (pm)* - 24 May EG2 on Taxation (second meeting)
28-30 May EG3 on Special Topics (first meeting)
17-19 (am)June EG3 on Special Topics (second meeting)
24-26 June DG3 on Definition, Treatment and Protection of Investors and Investments (first meeting)

11 (pm) -13 September 1996**

1. Report by EG3 on Special Topics
2. Relationship to other International Agreements
 - a) WTO Agreements (including GATS, TRIMS and TRIPS)
 - b) IMF Agreement
 - c) Bilateral, Regional and Sectoral Agreements
 - d) OECD Codes
 - e) OECD Declaration and Decisions
3. Implementation of the agreement (including a "Parties Group")
4. Financial Services Matters

Lunch topic (12 September): Liberalisation: Approach and Package

Drafting/Expert Groups

9 - 11 (am) Sept EG3 on Special Topics (third meeting)
16-18 (am) Sept EG4 on Institutional Issues and Relations with other International Agreements (first meeting)
18 (pm) - 20 Sept DG3 on Definition, Treatment and Protection of Investors and Investments

* As agreed at the meeting of the Expert Group held on 22-24 April 1996

** If necessary, continuation of discussion of the issues dealt with at the June meeting.

ANNEX 2

TENTATIVE DATES FOR REMAINDER OF 1996

June 17-21

September 9-13

October 21-25

* December 16-20

TENTATIVE DATES FOR 1997

January 20-24

February 24-29

March 24-29

April 2-7

* Changed from 9-13 December to avoid conflict with the Singapore Ministerial Meeting of WTO.