



Negotiating Group on the Multilateral Agreement on Investment (MAI)

SUMMARY RECORD

Meeting on 19-21 June 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)4].

2. Approval of the Summary Record of the meeting held on 18-19 April 1996

One delegation requested a modification of item 7, paragraph 2. The second sentence should read: "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 **have a limited scope of application.**"

The Group approved the Summary Record [DAFFE/MAI/M/(96)3] as amended.

3. Issues raised by reports DG1 and DG2

The Negotiating Group addressed the issues selected by the Chairman in his note [DAFFE/MAI(96)17], drawn from the consolidated reports of DG1 and DG2 [DAFFE/MAI(96)16].

I. Definition of investor and investment

Investor:

Permanent residents

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).

Branches

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) the implications in 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 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.

Investment:

Scope of application of definition/Open or closed list.

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.

Indirect ownership or control

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 would give rise to a problem of free-riders and would 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.

II. Treatment of investor and investment

National treatment and most favoured nation treatment:

In like circumstances

There is agreement that National treatment and most-favoured-nation treatment were 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". This note would closely follow the comments in the report by DG2 [see DAF/MAI(96)16, paragraph 5, page 16].

The Chairman also invited the Drafting Group to look at the text of the interpretive declarations made by two delegations in the context of the Energy Charter Treaty, and of any other proposal that these delegations might make in this connection.

Transparency

The Chairman proposed to remove the square brackets on the second sentence of paragraph 2.1 of the article on Transparency. He noted that several delegations could go along with this proposal provided that there was a satisfactory explanatory statement in the commentary. He requested DG3 to look for appropriate language.

III. Investment Protection

General Treatment:

Unreasonable/discriminatory measures

Most bilateral investment treaties contain a general clause affording investor protection from government measures which are unreasonable or discriminatory. However, there is one country which is particularly concerned that this would give foreign investors better than national treatment because the standard for challenging a government measure in its domestic law is based on a double standard of unreasonable and discriminatory. Delegations discussed a possible compromise proposal to combine the elements in paragraphs 1 and 2 but did not come to a final conclusion. The Chairman proposed that DG3 re-examine this proposal which would result in a revised article 1.1 and the deletion of article 1.2.

Expropriation and Compensation:

Risk of exchange rate loss and freely usable/convertible currency

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. He asked the Secretariat to prepare examples of different methods of calculation and invited the IMF to make a written contribution on the issue of convertibility. 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 the obligation of a Party to protect confidential business information [article 2.3 on transparency]. The proposal by one delegation in DG2's commentary also included an additional aspect relating to special formalities. There were different views whether the MAI needed to make specific provisions to this effect. 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 which were raised in article 2.3. The Drafting Group should also assess whether this clause would address the concerns raised with regard to the transfer of funds (article 4.6 which is bracketed in the consolidated text). 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.

IV. General Exceptions

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. One country, however, has political difficulties with such an absolute guarantee. It is admittedly unlikely that an OECD country would invoke a general exceptions provision to deny compensation, and the Chairman encouraged further consideration of this issue with a view to a compromise which would 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.

4. Report by Expert Group N° 2 on Taxation Matters

The Chairman thanked the Group and its chairman, Mr. Revilla, for their report [DAFFE/MAI/EG2(96)8]. 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 5).

5. Issues relating to Extraterritoriality

Conflicting Requirements and Secondary Investment Boycotts

The Negotiating Group discussed issues relating to extraterritoriality and how they might relate to the MAI, based on notes by the chairman [DAFFE/MAI(96)18 and DAFPE/MAI(96)19], contributions by one delegation [DAFFE/MAI/RD(96)23 and DAFPE/MAI/RD(96)24], and by another delegation [DAFFE/MAI/RD(96)29 and DAFPE/MAI/RD(96)30]. 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 it was not apparent 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 4). All other aspects and proposals on these issues would remain on the Negotiating Group agenda.

6. Scope of Dispute Settlement

The Group considered the note by the Chairman [DAFFE/MAI(96)20] and the contribution by one delegation [DAFFE/MAI/RD(96)28]. It is agreed that investor-state dispute settlement would enhance the effectiveness of the MAI [DAFFE/MAI/M(95)3]. 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 4) which is to develop texts starting with consultations/conciliation and state-state dispute settlement.

7. Report by the CIME/CMIT on the analytical inventory of measures affecting investment

The Group examined the inventory of measures affecting investment [DAFFE/MAI(96)15/REV1]. The Group 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. In the meantime, Delegations were invited to consider which measures could or should be removed in the context of MAI negotiations.

8. Next Steps/Other Business

a. Agendas for September and October 1996

The Group approved the draft agendas for 11-13 September (beginning in the afternoon of the 11th) and for 23-25 October (beginning in the afternoon of the 23rd). 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. Mandates

The Group adopted a mandate for Drafting Group 3 (Annex 3), and approved the revised mandates for Expert Group 1 (Annex 4) and Expert Group 2 (Annex 5).

ANNEX 1

Draft Agendas for September and October 1996

11 (p.m.)-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. Progress Report by DG3 on the Definition, Treatment and Protection of Investors and Investments
5. Financial Matters under the MAI (including prudential matters and BOP derogation)

Lunch topic (12 September): Environment Matters
Outreach to Non-Members

Drafting/Expert Groups

24-26 June	DG3 on Definition, Treatment and Protection of Investors and Investments
9-11 (am) Sept	EG3 on Special Topics (third meeting)
16-18 (am) Sept	DG3 on Definition, Treatment and Protection of Investors and Investments
18 (p.m.)-20 Sept	EG1 on Dispute Settlement and Geographical Scope

23 (p.m.) - 25 October 1996

1. Final Report by DG3 on Definition, Treatment and Protection of Investors and Investments
2. Selected Issues arising from the Report by EG3 on Special Topics
3. Progress Report by EG1 on Dispute Settlement and Geographical Scope
4. Progress Report by EG2 on Taxation Matters
5. Non-discriminatory barriers
6. Cultural Matters
7. Environmental Matters
8. Analytical inventory of investment measures

Lunch topic (24 October): Liberalisation: Approach and Package
Labour Matters

Drafting/Expert Groups

14-16(am) Oct	EG4 on Institutional Issues and Relations with other International Agreements (first meeting)
16(p.m.) - 18 Oct	EG2 on Tax Matters
21-23 (am) Oct	EG1 on Dispute Settlement and Geographical Scope

ANNEX 2

TENTATIVE DATES FOR REMAINDER OF 1996 and 1997

* December 16-20

January 20-24

February 24-29

March 24-29

April 2-7

* The Negotiating Group will meet in the week 16-20 December to avoid conflict with the Singapore Ministerial Meeting of WTO.

ANNEX 3

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 prepared by Drafting Groups No. 1 and No. 2, taking account of guidance provided by the Negotiating Group.
2. The Group will report to the Negotiating Group at its sessions in September and October 1996.
3. The Group will terminate after its Report to the Negotiating Group, unless the Negotiating Group decides otherwise.

ANNEX 4

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
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. Priority will be given to proposals on state-to-state dispute settlement.
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.

ANNEX 5

**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.