



Negotiating Group on the Multilateral Agreement on Investment (MAI)

SUMMARY RECORD

Meeting on 24-25 October 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)6].

2. Approval of the Summary Record of the meeting held on 11-13 September 1996

One delegation requested a modification of item 4, third paragraph concerning the relation between the GATS and the MAI. The last sentence should read "A clear majority questioned the validity of invoking Article V to exempt MAI parties from MFN obligations under the GATS, but some delegations suggested **that this and other possible legal solutions should be further examined.**"

Concerning item 5, the MAI and the OECD instruments, the delegation requested an additional sentence at the end of the second paragraph: "**There was also a proposal that certain parts of the Guidelines be incorporated into the MAI.**". Furthermore, the delegation asked that the last paragraph in that item be amended to read: "The Chairman invited the Secretariat to prepare a legal analysis of the modalities and implications of associating the Guidelines to the MAI **as suggested by the majority of delegations.**"

The Group approved the Summary Record [DAFFE/MAI/M(96)5] as amended.

3. Non-Discriminatory Barriers

Delegates considered the note by the Chairman [DAFFE/MAI(96)28] and whether the MAI should include a general market access provision covering non-discriminatory barriers to investment which may distort competitive opportunities for foreign investors. Some delegations were of the opinion that the GATS market access provision would be an appropriate model.

The Chairman noted that the large majority of delegations did not want to include a general market access provision which they thought unnecessary in an investment agreement because National Treatment would cover de facto, as well as de jure, discrimination. Delegations were uncertain about how to deal with market needs test (economic needs tests) and considered whether the MAI should prohibit, or impose a transparency obligation, on such measures.

The Chairman did not think there was sufficient support for a general market access clause but referred the issues relating to economic needs tests to Expert Group 3 on Special Topics (see below, item 9). The Secretariat was invited to prepare a paper analysing the concept of de facto discrimination in light of the experience with the existing OECD instruments.

4. The Treatment of Cultural Measures in the MAI

The Note by the Chairman [DAFFE/MAI(96)29] considered the question of the treatment of cultural measures in the MAI. One delegation made reference to its written contribution [DAFFE/MAI/RD(96)26] setting out a proposal for an exception clause for cultural industries in the MAI. The delegation also proposed [DAFFE/MAI/RD(96)46] that Drafting Group 3 consider the implications of including intellectual property, including artistic and literary property, in the definition of investment (see item 9, below).

Delegations acknowledged the sensitivity of this issue for many countries. The promotion and protection of cultural diversity and identity is an important policy matter in some countries but should not be used for purposes of protectionism. The Negotiating Group emphasised the importance of dealing with this issue constructively.

The Chairman noted divergent views. Some Delegations would like to see cultural matters carved out of the agreement, for example under a general exception clause which would be self-judging and not subject to monitoring or dispute settlement. Other delegations think that such an approach, found in trade-related agreements, would be inappropriate in an investment agreement and that to include such a provision in the MAI would be a step backwards from existing commitments. Countries wishing to discriminate against foreign investors in this area could protect their position by lodging a country-specific exception which would be subject to standstill and rollback.

Other delegations would favour special treatment for cultural industries but would also want to avoid potential abuse for protectionist purposes. Several possibilities were mentioned such as a general exception clause combined with an anti-abuse provision or the loosening of standstill and rollback requirements for country specific exceptions motivated by cultural concerns.

The Chairman concluded that a clear majority did not favour a sweeping carve-out for cultural measures in the agreement. He suggested that a solution be explored building on the experience with the OECD Codes and the National Treatment Instrument. The issue should be kept on the agenda of the Negotiating Group, and the Bureau will conduct informal consultations with a view to finding an acceptable solution.

5. Environmental Matters

The Negotiating Group discussed the issues raised in the Note by the Chairman [DAFFE/MAI(96)30] and the Note by the Chairman of the OECD Environment Policy Committee [DAFFE/MAI/RD(96)45]. The Group considered the question of how the MAI should respond to environmental concerns. It examined how other international agreements have addressed the issue and proposed several options for the MAI.

Delegations agreed that the MAI could address environmental concerns in several ways:

- the preamble of the MAI could contain a reference to sustainable development and the need for protection and conservation of the environment;
- the text of the agreement could provide that countries should not compete for investment by lowering environmental standards and should agree to consultations at the request of interested parties, (modelled on NAFTA 1114(2));

- associating the OECD Guidelines to the MAI which would highlight the importance attached to the observance of environmental standards by enterprises, whether domestic or foreign controlled.

Some Delegations were in favour of updating the environmental chapter of the Guidelines, but due to time constraints it was considered that any such updating would have to take place after the conclusion of the MAI negotiations. Expert Group 4 on Institutional Matters was asked to examine the association of the OECD Guidelines to the MAI (see item 9, below).

The Chairman stated that delegations did not agree on whether a provision was needed to explicitly provide that MAI Parties would be free to introduce non-discriminatory environmental standards (model NAFTA 1114(1)). In the view of many delegations, such a clause was unnecessary as it stated the obvious and might create confusion.

The Negotiating Group charged Drafting Group 3 with the task of preparing a draft preamble for the MAI and for preparing draft text for a provision which calls for MAI countries not to lower standards in order to attract investment (see item 9, below).

6. Inventory of Investment Measures

Delegations took note of the updated Inventory of Measures [DAFFE/MAI(96)15/REV1]. They agreed that capitals should check the information for accuracy and that the document would provide a useful reference tool for work on country specific reservations which would be necessary for the MAI. The structure and content of the inventory should not prejudge the method or approach to liberalisation which would be for the Negotiating Group's discussion in December.

The Chairman concluded that the liberalisation debate to be held in December should determine what further work should be done to the inventory.

7. Report by Drafting Group 3 on Definition, Treatment and Protection of Investors and Investments

The Negotiating Group noted the report by Drafting Group 3 [DAFFE/MAI/DG3(96)1] and thanked the Group and its Chairman, Mr Haas. Some delegations thought that advice from the Negotiating Group was needed in order to advance on the outstanding issues. Others felt that a policy debate at this time would not be fruitful and proposed consideration of selected issues in December. It was suggested that less formal discussions than the plenary Negotiating Group sessions might be more productive in resolving some of the outstanding questions.

The Chairman took note of the suggestions by many delegations that matters relating to the definition of investors and investment should be the highest priority. He remarked that the Negotiating Group would have the opportunity at its December meeting for a more in-depth examination of some of the other issues raised by DG3.

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

The Chairman of the Expert Group, Mr. Baldi, reported on the progress made in setting up a dispute settlement mechanism for the MAI which would include state-state consultations and conciliation procedures, state-state arbitration, and investor-state dispute settlement. The Group was in the process of addressing many of the technical issues and had identified areas where political guidance would be sought from the Negotiating Group at some later time. Mr. Baldi reported the reservation by some countries that a dispute settlement mechanism should not be finalised until the substantive obligations of the MAI had been agreed.

The Expert Group also reported on its discussions on conflicting requirements and its review of the existing OECD instrument [DAFFE/MAI/EG1(96)16/REV1]. The Negotiating Group noted the observation by Expert Group 1 that while the OECD instruments in this area have been relatively successful, conflicts involving foreign policy concerns, particularly economic sanctions taken for foreign policy reasons had been more difficult. Most delegations drew attention to perceived inadequacies in the existing instruments which would limit their effectiveness in dealing with these issues. (See discussion on extraterritoriality under agenda item 9, below).

The Negotiating Group thanked the Group and Mr Baldi and noted that EG1 would make a final report on its work in December.

9. Next Steps/Other Business

a. Other Business:

Issues relating to Extraterritoriality

Some delegations recalled their desire to address the legal implications of earlier specific proposals of how to deal with extraterritoriality issues in the MAI, including conflicting requirements and secondary investment boycotts. Delegations recognised the political sensitivity of these issues and decided to add this to the formal agenda items for the Group's December meeting. The Chairman noted that the December discussion could take place on the basis of papers already contributed to the Negotiating Group.

b. Agendas for December 1996 and January 1997

The Group approved the draft agendas for 18-20 December 1996 and for 29-31 January 1997 [DAFFE/MAI/RD(96)47]. The agendas are attached as Annex 1.

c. Future meetings

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

d. Referral to Drafting/Expert Groups

The Group approved a revised mandate for Expert Group 3 on Special Topics (Annex 3), and Expert Group 4 on Institutional Matters (Annex 4). It adopted a new mandate (Annex 5) for Drafting Group 3 on Definition, Treatment and Protection of investors and investments.

Annex 1

MAI : Draft Agendas for December and January 1996

18 - 20 December

1. Reports by Expert Groups/Drafting Groups
 - a. Report by DG3 on Definition, Treatment and Protection of Investors/Investments
 - b. Report by EG1 on Dispute Settlement and Geographical Scope
 - c. Report by EG2 on Taxation Matters
 - d. Report by EG3 on Special Topics
 - e. Report by EG4 on Institutional Matters
 - f. Report by EG5 on Financial Matters
2. Regional economic integration organisations
3. Labour matters
4. Selected Issues from DG3 on Definition, Treatment and Protection of Investors and Investments
5. Selected Issues from EG3 on Special Topics
6. Liberalisation approach
7. Conflicting Requirements and Related Matters
8. Overview of the Agreement

Lunch topics (18 December): Organising the remainder of the negotiations
 Outreach to Non-Members

Drafting/Expert Groups

Nov 18-20	EG3 on Special Topics
Nov 21-22	EG4 on Institutional Matters
Dec 5-6	EG5 on Financial Services Matters
Dec 9-11(am)	EG2 on Taxation Matters
Dec 11(p.m.)-12	DG3 on Definition, Treatment and Protection of Investors/Investments
Dec 13	EG1 on Dispute Settlement and Geographical Scope
Dec 16-17	EG1 on Dispute Settlement and Geographical Scope

29-31 January 1996

1. Definition and Scope of the Agreement
2. Scope and Application of Dispute Settlement
3. Measures taken by sub-national governments
4. Second Report by EG4 on Institutional Matters
5. General Exceptions
6. Special Topics
7. [Other Topics to be added following the December meeting]

Lunch topics (29 January): Selected Issues for negotiation
 Accession of Non-Members

Drafting/Expert Groups

Jan 22-23	DG3 on Definition, Treatment and Protection of Investors/Investments
Jan 24	EG4 on Institutional Matters
Jan 27-28	EG3 on Special Topics

Annex 2

MAI Meeting Schedule

January

22-24 Expert/Drafting Groups
27-28 Expert/Drafting Groups
29-31 Negotiating Group on Multilateral Agreement on Investment

February

24-26(am) Expert/Drafting Groups
26(pm)-28 Negotiating Group on Multilateral Agreement on Investment

March

19-21 Expert/Drafting Groups
24-25 Expert/Drafting Groups
26-27 Negotiating Group on Multilateral Agreement on Investment

April

16-18 MAI: Expert/Drafting Groups
21-23(am) Expert/Drafting Groups
23(pm)-25 Negotiating Group on Multilateral Agreement on Investment

May

12-16 Expert/Drafting Groups
or
Negotiating Group on Multilateral Agreement on Investment

Annex 3

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
 - e. Investment Incentives
 - f. Corporate Practices
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 November and report to the Negotiating Group at its session in December 1996 **on the topics listed in paragraph 1.**
4. **The Group will meet again in January 1997 and report to the Negotiating Group at its January 1997 session on the topics listed in paragraph 2.**
5. The Group will terminate after its January Report to the Negotiating Group, unless the Negotiating Group decides otherwise.

Annex 4

REVISED MANDATE FOR EXPERT GROUP N° 4 ON “INSTITUTIONAL MATTERS”

1. The Expert Group, open to participation of all delegations, is charged with considering the following topics:
 - a. Implementation and operation of the MAI, including the role of the Parties Group
 - b. Accession of Non-Members
 - c. Relationship of the MAI to the WTO Agreements and other international agreements
 - d. Associating the OECD Guidelines with the MAI**
2. The Group will meet in October and November and make proposals **on topics 1 a., b. and c.,** including proposals for text where appropriate, to the Negotiating Group at its December 1996 meeting.
- 3. The Group will meet again in January 1997 and make proposals on topic 1 d, including proposals for text where appropriate, to the Negotiating Group in January 1997.**
4. The Group’s mandate will terminate after its report to the Negotiating Group, unless the Negotiating Group decides otherwise.

Annex 5

**NEW 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 December, January and possibly February. It will report to the Negotiating Group on item 1 at its session in December 1996, 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.