



Negotiating Group on the Multilateral Agreement on Investment (MAI)

SUMMARY RECORD

Meeting on 18-20 December 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)7].

2. Approval of the Summary Record of the meeting held on 24-25 October 1996

One delegation requested modification of paragraph 3, Item 4 relating to the Treatment of Cultural Measures in the MAI, as follows (changes are indicated in bold):

"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 should be self-judging and not subject to monitoring or dispute settlement. **They considered that this would produce a result coherent with that in trade related agreements.** Other delegations think that such an approach would be inappropriate in an investment agreement and that to include such a provision in the MAI **would limit its application and undermine its relevance.** 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."

At the request of the delegation, a sentence has been added after the third tiret, paragraph 2 of Item 5, "Environmental Matters" to read:

"One delegation identified additional issues worthy of further consideration by the Group, such as the Rio Declaration, Agenda 21, and elements of the NAFTA Supplemental Agreement on the Environment".

The Group approved the Summary Record [DAFFE/MAI/M/(96)6] as amended.

3. Reports by: DG3, EG1, EG2, EG3, EG4, EG5

The Chairs of the Drafting and Expert Groups presented the results of their Groups' work [DAFFE/MAI/DG3(96)3, DAFPE/MAI/EG1(96)15, DAFPE/MAI/EG2(96)9, DAFPE/MAI/EG3(96)22, DAFPE/MAI/EG4(96)7, DAFPE/MAI/EG5(96)5]. They noted the progress made and highlighted some of the outstanding issues.

The Chairman 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. Delegations should examine a comprehensive text of the agreement (with square brackets and footnotes) before the January Negotiating Group meeting in order to have an overview of the outstanding issues that need to be addressed.

4. Regional Economic Integration Organisations

One delegation presented a contribution [DAFFE/MAI/RD(96)48] setting out a proposal for an MAI clause dealing with measures taken by members of REIOs. This delegation indicated that the proposed clause had been based on the general principles enunciated in its earlier contribution [DAFFE/MAI/RD(96)21]. It stressed that the investment-related rules of the REIO guarantee an unconditional right of free movement of capital between it and third countries and that REIO members are required to provide national treatment for companies from third countries established in accordance with the law of a REIO member and having a registered office therein. This delegation explained the provisions of the draft article and suggested that the practical implications for investment matters of a REIO will be rather limited and can be subject to continued scrutiny.

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.

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 Chairman invited countries to meet informally in the margins of the Negotiating Group's meeting to explore these issues further. He asked the delegation to co-ordinate this informal meeting and to report to the Negotiating Group on the results of these consultations.

Later in the meeting, this delegation reported that the informal meeting had provided an opportunity to explain the objectives of a REIO clause in the MAI and to demonstrate how the proposed texts would meet REIO needs. The discussion showed that further explanatory work is necessary and this delegation agreed to reflect on proposals to modify the language of the REIO clause. This delegation would welcome a further process of consultation at the next NG meeting in January.

5. Labour Matters in the MAI

The Negotiating Group reviewed the Chairman's note [DAFFE/MAI(96)32] and 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 recognise that it is inappropriate to relax domestic 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.

6. Selected Issues Arising from Drafting Group 3 on Definition, Treatment and Protection of Investors and Investments ¹

The Negotiating Group addressed the issues raised by the Chairman's note [DAFFE/MAI(96)33].

1) INDIRECT INVESTMENT

The Chairman remitted this issue for further consideration by an informal working group chaired by Mr. Schekulin (Austria) and which should consult in the margins of the meeting and report back to the Negotiating Group.

Later in the meeting, Mr. Schekulin provided a brief summary of the results of these discussions which reviewed all the options in the Chairman's note. He reported broad consensus that further clarification of what was meant by "control" would be necessary. He confirmed that cases a) and c) would be covered with or without reference to the "control" theory but that especially for case a) a denial of benefits clause would be necessary. For case d), all participants had agreed that it should be covered by the MAI with one country limiting its agreement to the case of expropriation.

Later in the meeting, Mr. Schekulin reported that consensus on case b) was more difficult to achieve as several delegations made clear that their positions were based, at least partially, on non-technical considerations. Nevertheless, he noted full agreement that standing for dispute settlement in both state-state and investor-state should be limited to MAI Parties and investors. He identified other issues of a more technical nature which required further consideration at the drafting group level.

¹ The outcome of the Negotiating Group's discussion on all these matters is contained in the Chairman's conclusions [DAFFE/MAI(97)2] which he announced would provide guidance for the informal discussions and for further consideration of these matters by the drafting/expert groups.

2) LOSSES FROM CURRENCY FLUCTUATIONS

The Chairman noted that a large majority were in favour of having no explicit provision in the MAI addressing this issue. 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.

3) TRANSFERS

The Chairman noted that countries were ready to accept a provision to take account of the concerns addressed in paragraph 4.6 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.

4) CONTROLS AND FORMALITIES

The Chairman concluded that an additional sentence, based on the sentence in paragraph a), should be added to Article 2.3 provided that an acceptable formulation was found.

He concluded that there was not sufficient support for the inclusion in that article of an additional paragraph (b) which would cover certain residence requirements as part of formalities in connection with the establishment of investments.

7. Selected Issues Arising from Expert Group 3 on Special Topics²

The Group considered the issues raised in the Chairman's note [DAFFE/MAI(96)31] and the Chairman drew the following conclusions:

1) KEY PERSONNEL

The Chairman noted an emerging consensus on a chapeau clause option B according to which MAI would prevail with respect to national labour market or economic needs test and numerical restrictions. The Expert Group should study modifying the language along the lines proposed by one delegation or by revising the language of paragraph 5(a). Many delegations were in favour of an anti-abuse clause but others cautioned against introducing this concept into the chapeau. The exact drafting should be settled quickly by EG3.

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.

² The outcome of the Negotiating Group's discussion on all these matters is contained in the Chairman's conclusions [DAFFE/MAI(97)2] which he announced would provide guidance for the informal discussions and for further consideration of these matters by the drafting/expert groups.

2) PERFORMANCE REQUIREMENTS

Coverage of services (section II of EG3 report, paragraphs 1 and 3)

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 with respect to paragraphs 1(a) or paragraph 3(a) and 3(c) of the draft article on performance requirements 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.

3) PRIVATISATION

Special share arrangements (section II of the EG3 report, paragraph 3, and related commentary)

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 that 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 of the MAI 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.

4) MONOPOLIES

Anticompetitive practices of monopolies in a non-monopolised market (section IV of the EG3 report, paragraph (3) of Article A and related commentary)

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. Proposals for text have been put forward in EG3. There was agreement to continue consideration of these proposals in the margins of the next meeting of the Negotiating Group, if possible, with the participation of competition experts.

As concerns the proposal made by one delegation (DAFFE/MAI/RD(96)57), the Chairman concluded that the preliminary reaction of several delegations was not favourable to the principle of the lodging new country-specific reservations in the context of future demonopolisations. This matter has not, however, been sufficiently discussed to reach a definite conclusion. Advice of EG3 is therefore required.

5) INVESTMENT INCENTIVES

Investment Incentives - "Positive discrimination" (section V of EG3 report)

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.

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

6) CORPORATE PRACTICES

Non-government imposed corporate practices (section VI of the EG3 report, paragraph 3, and related commentary)

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 delegation maintained its view that the MAI should also contain disciplines on non-government imposed discriminatory corporate practices.

8. Overview of the Agreement

Delegations noted the Chairman's note [DAFFE/MAI(96)4] providing an indication of existing available texts and the corresponding reference number, as well as an indication of issues still under consideration by the Negotiating Group. The Chairman requested that the Overview serve as a guide for compiling from the texts produced by the drafting/expert groups, a comprehensive draft agreement with accompanying footnotes and commentary. One delegation requested that its proposals on a REIO clause [DAFFE/MAI/RD(96)48], conflicting requirements [DAFFE/MAI/RD(96)53], and secondary investment boycotts [DAFFE/MAI/RD(96)52] be attached to the Consolidated Texts and Commentary³.

9. Liberalisation Approach

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 liberalisation objectives as presented in his note [DAFFE/MAI(96)35]. 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. Discussions in both plenary and informal groups should be on the basis of specific texts or drafting proposals. In January, the Negotiating Group would start a detailed review of the consolidated texts.

On the basis of the discussion, the Chairman concluded that there was broad support for the working method he had proposed. The MAI text was of paramount importance but negotiations on the degree of liberalisation should move forward at the same time. Some countries expressed concern that they may have difficulty ensuring representation at all meetings but the Chairman assured them that 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 in early February, 1997 according to a standardised format which he would send to Delegations as soon as possible in January. 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.

³ This has since been issued as DAF/MAI(97)1

10. Conflicting Requirements

One delegate presented the notes on Secondary Investment Boycotts [DAFFE/MAI/RD(96)52] and Conflicting Requirements [DAFFE/MAI/RD(96)53] which proposed amendments to draft texts put forward by another delegation in DAF/MAI/RD(96)24 and DAF/MAI/RD(96)23. He explained the rationale behind the proposed modifications.

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.

11. Next Steps/Other Business

a. Agendas for January and February 1997

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.

b. Future meetings

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

c. Mandates for Drafting/Expert Groups

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.