



Negotiating Group on the Multilateral Agreement on Investment (MAI)

LIST OF ISSUES FOR CONSIDERATION BY THE NEGOTIATING GROUP

(Note by the Chairman)

LIST OF ISSUES FOR CONSIDERATION BY THE NEGOTIATING GROUP

(Note by the Chairman)

This note is based on the consolidated texts and comments from Drafting Groups 1 and 2 . There are numerous issues highlighted in the comments by the Drafting Groups as well as issues that arise at the interface of the reports. Given the limited time for discussion, the Chairman has selected a number of issues which in his opinion, are ripe for discussion in the Negotiating Group with a view to trying to resolve some of them, or soliciting specific guidance before referral to the new ad hoc group on the definition and treatment of investor and investment (DG3), or to another drafting/expert group. The Chairman has given priority to issues concerning the definitions of investor and investment since these are of key importance to the work of the groups.

The issues are briefly described for the convenience of delegates and there is no attempt to reflect the full range of views that were expressed during the extensive debates in the drafting groups. Reference to the full set of comments as reproduced in DAF/MAI(96)16 is provided at the beginning of each issue.

I. DEFINITIONS OF INVESTOR AND INVESTMENT

1. Investor

Permanent residents (paragraph 2, page 10)

Concern was expressed about including permanent residents in the definition of investor. The main concern relates to the issue of the standing of permanent residents under the MAI dispute settlement provisions.

- The fact that this issue is in square brackets may reflect the lack of time which prevented delegations from arriving at a solution. If this is confirmed, would delegates agree to refer the issue to DG3 to agree on proposed language?
- If there are remaining concerns as to the standing of permanent residents for purposes of dispute settlement, could this be referred to the Expert Group on dispute settlement and geographical scope?

Branches (paragraph 3, page 10)

There was concern that including branches in the definition of investor could give rise to a free-rider problem. The setting up of "letter-box" companies without genuine business links to the host state could also arise with respect to other forms of investment, including incorporated forms. One possible solution which has been advanced is the inclusion in the MAI of a general "denial of benefits" clause allowing Parties to exclude entities that do not undertake genuine/substantial business.

- Would delegates agree that this question be examined by DG3 in the context of a denial of benefits provision?

2. Investment

Scope of application of definition (paragraphs 7-11, pages 10-11)

There is consensus in favour of applying a broad asset-based definition with respect to the MAI obligations to protect existing investments. However, several delegations expressed concerns over how the MAI obligation concerning national treatment would apply. Some delegations consider that an unqualified application of the national treatment obligation to a broad range of assets could interfere with the regulation of cross-border financial operations and trade which are not meant to be covered by the MAI.

- Are delegations mainly concerned with possible interference with control over cross-border financial operations?
- Should the assets included in the definition cover only those that are acquired or used for economic or business purposes? Should DG3 be instructed to consider other approaches

to limiting the application of the definition, taking account of the possibility of a provision dealing with prudential measures (to be discussed in the Negotiating Group's meeting in September 1996) in the MAI which might already address some of the concerns?

Open or closed list of assets

This issue is closely linked to the scope of the definition of investment. "Including" is in square brackets, although many delegations expressed a preference for an open list.

- Do delegations agree that the list should be open? Should DG3 be requested to take this up in conjunction with the scope of application of the definition of investment?

Indirect ownership or control (paragraphs 13-15, page 12,)

There are two kinds of indirect ownership: (i) new investment by established holding companies in the same country, and (ii) investment via a third country (not party to the MAI).

Views differ on whether the MAI should cover investments indirectly owned or controlled by investors of a Party. Covering such investment would offer maximum protection to investors but could lead to complications as far as dispute settlement is concerned.

- How relevant is the issue of "free-riders" in this context?
- If indirect investment is included, can the issue of the standing of controlled companies for the purpose of dispute settlement be addressed by the Expert Group on dispute settlement and geographical scope?

II. TREATMENT OF INVESTOR AND INVESTMENT

1. National Treatment and Most Favoured Nation

In like circumstances (paragraph 5, page 17)

There is agreement that National Treatment and MFN are comparative terms. Some delegations also believe that since these terms implicitly provide for the comparative context for determining whether or not a measure discriminates against foreign investors and their investments, the words "in like circumstances" are unnecessary and open to abuse.

Other delegations believe that the comparative context should be spelled out and favour the inclusion of the phrase "in like circumstances".

- Could the elaboration of an interpretative note confirming that National Treatment and MFN are comparative terms take care of all delegations points of view ? Could the task of drafting such a note and examining its place in the agreement (footnote, interpretative statement, proceedings of the MAI negotiations...) be made part of the mandate of DG3?

2. **Transparency** (paragraph 3, page 18)

Some governments may establish policies to guide their treatment of foreign investors and their investments without expressing them in laws, regulations, procedures and administrative rulings and judicial decisions of general application. The issue is whether the MAI should contain a specific provision requiring that these policies be published or otherwise made publicly available.

- The second sentence in brackets in the proposed text would appear to be unnecessary since the policies covered by it must ultimately have a legal base. Can this sentence be dropped?

III. **INVESTMENT PROTECTION**

1. **General Treatment**

Unreasonable/discriminatory measures (paragraph 7, page 20)

The General Treatment provision (Article 1.1) provides that investments will be accorded fair and equitable treatment and full and constant protection and security and treatment no less favourable than that required by international law.

In addition, Article 1.2 provides that Parties shall not impair the operation, management, maintenance, use, enjoyment or disposal of investments by either unreasonable **or** discriminatory measures or by unreasonable **and** discriminatory measures.

- Would delegations accept the term "unreasonable or discriminatory"? If not, can this matter be referred to DG3 with the instruction that they consider the various options, including that of deleting Article 1.2?

2. **Expropriation and Compensation**

Risk of exchange rate losses (paragraph 7, page 21)

The question is: should a compensating Contracting Party accept responsibility for exchange rate losses occurring to the investor where there is delay in payment? And, if so, how that responsibility should be measured? One option is to leave the exchange rate responsibility explicitly to the investor. Another option would be for the compensating Contracting Party to accept the responsibility implicitly, so that in the event of a breach of the obligation to pay without delay, the investor would be entitled to compensation for exchange rate losses as an element of damages in addition to interest, even without an explicit provision on this matter in this agreement. The third option would consist of the compensating Contracting Party explicitly accepting such an exchange rate responsibility.

- Would it be sufficient to confirm that an exchange rate loss arising from a violation of the MAI, would be an element of damages to be included in the amount of compensation paid? If so, can the issue be referred to DG3 for resolution?

Freely usable/convertible currency (paragraphs 7-8, page 21-22 and paragraph 5, page 23)

It remains to be decided in which currency compensation should be calculated, paid, and transferred.

- Would delegations consider a solution which provides that compensation be paid in the currency of the home country of the investor, or any other currency that is accepted by the investor?

3. Transfers

Controls and Formalities

(paragraphs 1-3, page 19, paragraphs 9-10, pages 23-24, paragraphs 11-12, pages 30-31)

Delegations were concerned that the MAI not prevent a Party from applying measures that prescribe special formalities in connection with the establishment of investments, in an equitable and non-discriminatory manner, for the purpose of ensuring compliance with its national laws. There were also concerns that the MAI should protect the right of a contracting Party to protect business information that is confidential.

- Should the MAI contain a general provision on controls and formalities which also addresses the above concerns? If so, could DG3 be requested to draft such a provision?

4. Protecting Investor Rights arising from other agreements

(paragraphs 1-8, pages 26-28)

Three options emerged for dealing with rights arising from agreements between investors and states: (i) no special provision; (ii) a procedural provision, i.e., a dispute settlement clause; or (iii) a substantive and procedural provision, i.e., a "respect clause". There are also some subsidiary questions including the scope of coverage of such a provision.

- Does option (ii) represent an acceptable compromise? If so, would delegates agree to refer this issue to the Expert Group on dispute settlement and geographical scope?

IV. GENERAL EXCEPTIONS

Non-applicability of general exceptions to compensation and protection from strife (paragraphs 1-3, page 29)

It has been proposed that general exceptions not apply to all of the obligations under the agreement. The question is whether certain obligations (in particular expropriation and compensation and protection from strife) are considered so central to investor protection. In particular, there is some concern as to the implications for certain actions, such as the freezing of assets.

- Given most delegations' view that the MAI should provide an absolute guarantee that an investor will be compensated for expropriated property, can the square brackets on paragraph 1 of this article be deleted? If not, could the issue be referred to DG3 with the instruction to look for a way to accommodate the concerns?