



---

**Negotiating Group on the Multilateral Agreement on Investment (MAI)**

**SUMMARY RECORD**

**Meeting on 11-13 September 1996**

# NEGOTIATING GROUP ON THE MULTILATERAL AGREEMENT ON INVESTMENT

## SUMMARY RECORD

11-13 September 1996

### 1. Adoption of the Agenda

The Group adopted the agenda [DAFFE/MAI/A(96)5].

### 2. Approval of the Summary Record of the meeting held on 19-21 June 1996

One delegation requested a modification of item 5 concerning conflicting requirements and secondary investment boycotts (paragraph 1). The last sentence should read: "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 **there was no consensus** whether, and how, they could be addressed in the context of the MAI."

The Group approved the Summary Record [DAFFE/MAI/M/(96)4] as amended.

### 3. Report by Expert Group No. 3 on Special Topics

The chairman of Expert Group 3, Mr. Ahnliid, reported that the Group had prepared for consideration by the Negotiating Group an extensive commentary on all the issues identified in its mandate. Draft text, with brackets, had been examined in some cases and in most other areas consensus was emerging that National Treatment, MFN, and transparency obligations should apply.

The Negotiating Group decided to extend the mandate of the Expert Group and invited it to report back at its session in December (see Annex 1).

### 4. Relationship of MAI to Other International Agreements

#### a. The WTO Agreements

Delegates addressed the issues raised by the Note by the Chairman [DAFFE/MAI(96)21], and the note by the WTO Secretariat [DAFFE/MAI(96)37]. There was agreement that the WTO and the MAI are complementary in purpose and content and that, a priori, there is no conflict between the two systems. Areas where there is likely overlap between substantive provisions in the MAI and GATS, TRIMS, TRIPS, and the agreement on Subsidies and Countervailing Measures will become clearer once MAI obligations have been defined. Potential overlap between GATS and MAI raised questions as to the implications of Article II MFN obligations in GATS, in particular the extension of MAI benefits to non-MAI parties.

The Chairman thought it important to emphasise that delegates did not see any conflict between the WTO and the MAI. He recognised that in areas where substantive obligations are likely to overlap, it would be necessary to avoid creating inadvertent conflicts. The Chairman noted different views as to the extension of MAI obligations via an MFN obligation in the GATS. Further consideration should be given

as to what might be needed to avoid creating a disincentive for joining the MAI or a negative impact on future GATS negotiations.

As to the applicability of Article II in the GATS to procedural matters, the Chairman concluded that most countries were of the opinion that Article II should not extend to investor-state rights under the MAI. Nevertheless, there are relevant legal considerations which merit further reflection. Delegates discussed whether Article V of the GATS (regional integration clause) might be applicable to the MAI. A clear majority questioned the validity of invoking Article V to exempt MAI parties from MFN obligations under the GATS, but some delegations suggested this should not be ruled out without further examination.

Delegations identified several objectives for the interface between MAI and WTO in the field of dispute settlement: avoidance of forum shopping, avoidance of multiple procedures, and avoidance of contradictory awards. In considering whether the MAI should contain a rule that requires an election between two fora, delegates focused on the need to strike a balance between the sovereign rights of states as WTO members which cannot be interfered with, and the enforcement of investors' rights through effective and efficient dispute settlement. The NAFTA provisions of article 2005 which give discretion to the complaining Party to choose to settle a dispute under either NAFTA or GATT dispute settlement were cited as a possible model, although these could be harder to apply in a broader multilateral context.

On the specific issue of the election of a forum, the Chairman noted different views and thought that many of the technical issues raised in his note should be further addressed in the expert groups. He referred the core dispute settlement issues to Expert Group 1 on Dispute Settlement and Geographical Scope although other groups would also have an interest in the solutions proposed by EG1. The Group approved a revised mandate for EG1 set out in Annex 2.

#### b. The IMF Agreement

Delegations considered the Note by the Chairman [DAFFE/MAI(96)22], the statement by the IMF [DAFFE/MAI/RD(96)35] and the contribution by one delegation [DAFFE/MAI/RD(96)38]. The IMF presentation set out the considerations for including a balance of payments derogation (BOP) clause in the MAI and proposals designed to ensure consistent treatment of capital flows by the MAI and the Fund. A BOP clause would cover all types of payments in order to avoid conflicts between MAI and IMF obligations. Concerning the procedures for invoking the derogation, the IMF representative referred to the GATS as a possible model.

Delegations noted the absence of BOP derogations in bilateral investment treaties and in the ECT. The IMF Articles do not prevent members of the MAI from waiving the right to resort to temporary restrictions for balance of payment reasons.

Some delegates proposed that Art VIII convertibility could be considered a prerequisite for accession to the MAI. The needs of some non-Members might be accommodated through the negotiation of individual terms of accession to the MAI.

The Chairman noted that many delegations were still considering this issue, stressing the link between a possible BOP derogation in the MAI and the scope of the definition of investment. If a balance of payments derogation were to be included in the MAI, it was agreed that the clause should be subject to procedural safeguards to prevent abuse. A number of delegations continued to believe that under no circumstances should a balance of payments derogation apply to compensation payments in case of expropriation. The Chairman proposed that the Negotiating Group reassess the need for a balance of payments derogation at a later stage once agreement on definition and the scope of liberalisation had been achieved.

c. Bilateral, sectoral and regional agreements

On the first question raised in the Chairman's Note [DAFFE/MAI(96)26], the Chairman noted consensus that in case of overlap the provisions which are most favourable to investors should apply and that this should be made explicit in a non-derogation provision to be inserted in the MAI. Further work was needed to determine whether such a provision should be limited to other international agreements (as in the ECT) or whether it should cover a broader range of sources identified in the traditional BIT provision. The majority did not think it necessary to explicitly state that the MAI is intended to prevail over provisions of other sources giving investors less favourable treatment.

\* \* \*

The Negotiating Group agreed to create an Expert Group No. 4 on Institutional Matters charged with examining the issues raised with regard to the MAI and the WTO, IMF and other international agreements (see Annex 3).

## **5. The MAI and the OECD instruments**

The Chairman raised some considerations relating to the MAI and the OECD instruments in his note [DAFFE/MAI(96)23]. A contribution by one delegation [DAFFE/MAI/RD(96)31] proposed some options for incorporating the OECD Guidelines for Multinational Enterprises in the MAI.

The Chairman summarised the overall view that there was no conflict and therefore no need to include a specific provision to define the relationship between the MAI and the OECD Codes. With respect to the OECD Guidelines for Multinational Enterprises, he noted a large majority in favour of associating the Guidelines with the MAI without changing their legal nature. This could be achieved, for example, by a reference in the preamble and annexing of the Guidelines to the text of the agreement. Some Delegations felt that certain parts of the Guidelines should be revised but any major review of the Guidelines could only occur after MAI is concluded.

The Chairman invited the Secretariat to prepare a legal analysis of the modalities and implications of associating the Guidelines to the MAI without changing their non-binding status.

## **6. Implementation of the Agreement**

Delegates addressed the questions in the Chairman's note [DAFFE/MAI(96)24] regarding implementation arrangements for the MAI before and after its entry into force. Delegates considered that there should be no provisional application of the agreement pending its entry into force. As to how the MAI should operate, one approach would reflect the view that obligations are a matter for the Parties themselves, resorting to dispute settlement if necessary to enforce these obligations. Another approach would be that the MAI should have a collective mechanism which would rely on monitoring and peer review procedures. This would serve to discuss general questions of interpretation, although more caution was expressed with regard to any possible role of a Parties Group in dispute settlement.

The Chairman noted broad consensus that in the period between signature and entry into force, an Interim Group should be set up to conduct necessary business, such as examining requests for accession by non-Members and tracking information on the ratification process. All could accept a Parties Group

after ratification, although its role and function depended to a large extent on which approach is finally adopted for operation of the agreement. He concluded that a discussion on the role of a Parties Group in further liberalisation under the MAI would be premature until the Negotiating Group had had its orientation debate on liberalisation in December. Several countries had brought up administrative considerations such as secretariat functions, location, and budgetary funding, but the Chairman agreed that more reflection on these questions would be necessary.

The Negotiating Group agreed to refer these issues to the newly created Expert Group on Institutional Matters.

#### **7. Progress Report by Drafting Group No.3 on the Definition, Treatment, and Protection of Investors and Investments**

Drafting Group 3 under the chairmanship of Mr. Haas reported to the Negotiating Group on the issues which had been referred to it following consolidation of the reports by Drafting Groups 1 and 2. Progress had been made and provisional texts developed for several issues, including the definition of investment. The Group would examine these texts at its upcoming meeting and would make a final report, including texts, to the Negotiating Group in October.

#### **8. Financial Matters Under the MAI**

The Negotiating Group reviewed the Chairman's note [DAFFE/MAI(96)25] and considered whether specific provisions were needed in the MAI to address financial services. Delegates considered that national treatment and MFN obligations should not prevent the legitimate exercise of prudential oversight aimed at protecting users of financial services and ensuring stability of the system, provided any prudential carve-out would not undermine the purposes of the MAI.

The Chairman concluded from the discussion that the MAI should include a clause which would allow Parties to introduce or maintain measures taken for prudential reasons. He also noted that several delegations had identified specific issues relating to financial services which had implications for other elements of the agreement, including the definition of investors and investment. The Negotiating Group accepted the Chairman's proposal to create Expert Group No.5 created to deal with issues relating to financial services, and the development of a text on prudential measures. It approved a mandate for the Group set out in Annex 4.

#### **9. Next Steps/Other Business**

##### **a. Other Business:**

Issues relating to Extraterritoriality

In response to a question raised by one delegation, the Chairman confirmed that Expert Group No. 1 was scheduled to report to the Negotiating Group on its discussion on conflicting requirements and the OECD existing instrument. Other issues, including secondary investment boycotts, remain on the agenda of the Negotiating Group.

b. Agendas for October and December 1996

The Group approved the draft agendas for 24-25 October and for 18-20 December (beginning in the afternoon of the 18th) [DAFFE/MAI/RD/(96)39]. The agendas are attached as Annex 5.

c. Future meetings

A tentative list of meetings for 1996 and 1997 is attached as Annex 6.

d. Mandates

The Group approved a revised mandate for Expert Group 3 on Special Topics (Annex 1), and Expert Group 1 on Dispute Settlement and Geographical Scope (Annex 2). It adopted mandates for Expert Group 4 on Institutional Matters (Annex 3) and Expert Group 5 on Financial Matters (Annex 4).

## ANNEX 1

### **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 Research and Development/Technology.
3. The Group will meet in October and November and report to the Negotiating Group at its session in December 1996.
4. The Group will terminate after its Report to the Negotiating Group, unless the Negotiating Group decides otherwise.

## ANNEX 2

### **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
  - d. Issues arising from the relationship between the MAI and other international agreements, including the WTO agreements.
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.
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 3

### **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
2. The Group will meet in October and November and make proposals, including proposals for text where appropriate, to the Negotiating Group at its December 1996 meeting. Its first meeting should focus on implementation and operation of the MAI and accession of Non-Members.
3. The Group's mandate will terminate after its report to the Negotiating Group, unless the Negotiating Group decides otherwise.

## ANNEX 4

### 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 in particular the development of text on the treatment of prudential measures.
2. The Group may also identify and, where appropriate, make proposals on other issues important for, or specific to, financial services which need to be addressed under the agreement, including the definition of investors and investments.
3. The Group will meet in October, and possibly in November or December, and report to the Negotiating Group at its December 1996 meeting.
4. The Group's mandate will terminate after its report to the Negotiating Group, unless the Negotiating Group decides otherwise.

## ANNEX 5

### MAI : Draft Agendas for October and December 1996

#### 24 - 25 October 1996

1. Report by DG3 on Definition, Treatment and Protection of Investors and Investments
2. Progress Report by EG1 on Dispute Settlement and Geographical Scope
3. Non-Discriminatory Barriers
4. Cultural Matters
5. Environmental Matters
6. Analytical inventory of investment measures

Lunch Topics (24 October)      Liberalisation: Approach and Package  
Labour matters

#### Drafting/Expert Groups

Oct 14-15	EG3 on Special Topics
Oct 16-17	EG5 on Financial Matters
Oct 18	EG4 on Institutional Matters
Oct 21-23	EG1 on Dispute Settlement and Geographical Scope
Nov 18-20	EG3 on Special Topics
Nov 21-22	EG4 on Institutional Matters

#### 18 (p.m.) - 20 December

1. Overview of the Agreement
2. Labour matters
3. Report by EG2 on Taxation Matters
4. Final Report by EG3 on Special Topics
5. Report by EG4 on Institutional Matters
6. Final Report by EG5 on Financial Matters
7. Liberalisation
8. [For Negotiation] Remaining Issues from DG3 on Definition, Treatment and Protection of Investors and Investments
9. [For Negotiation] Remaining Issues from EG3 on Special Topics

Lunch topics (19 December):      Organising the remainder of the negotiations  
Outreach to Non-Members

#### Drafting/Expert Groups

Dec 9-11(am)	EG2 on Taxation Matters
Dec 11(p.m.)-13	[To be decided]
Dec 16-18(am)	EG1 on Dispute Settlement and Geographical Scope

## ANNEX 6

Tentative dates for remainder of 1996 and 1997

### **November 1996**

18-22 AMI: Groupes de rédaction  
MAI: Drafting Groups

### **1997**

#### **January**

22-24 Expert/Drafting Groups  
27-29(am) Expert/Drafting Groups  
29(pm)-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