



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Expert Group No.3 Expert Group No.3 on Treatment of Tax Issues in the MAI

**ISSUES RAISED BY MAI DRAFTING GROUP N°1:
SELECTED TOPICS CONCERNING INVESTMENT PROTECTION**

(Note by the Chairman)

VII. Protection of Investor rights arising from other agreements

22. As discussed in its report [DAFFE/MAI/DG1(96)1/REV1], the Drafting Group also considered the possibility of including in the MAI a special provision on investor rights arising from other agreements between investors and states. Essentially, two distinct issues are involved. The first is whether to specifically provide that the MAI should not prevail over other agreements that grant more favourable treatment to an investor. The second issue concerns whether rights granted under other investment agreements should be “imported” in the MAI.

23. Three broad conceptual approaches emerged in the Drafting Group: i) a “zero option, that is, no special provision in the MAI on rights under investor-state agreements; ii) a procedural provision, that is, a dispute settlement clause; or iii) a substantive and procedural provision, that is, a “respect of obligations” clause. As there was no consensus in the Group as to the most appropriate approach, no draft provisions were elaborated. Illustrative provisions were provided instead.

24. The first approach (“zero” option) does not appear to create any particular tax problems.

25. The second and third approaches, however, which would assure that disputes under investor-state agreements could be brought by the investor to international arbitration in the manner provided for under the MAI, could have some impact on taxation. For instance, they could, depending on how they are implemented, apply to some tax rulings. While the illustrative text concerning the procedural approach is quite specific, referring to an “investment authorisation” or “a written investment agreement or contract granting rights with respect to natural resources or other assets or economic activities ...”, the text concerning the substantive approach is more general referring to “any other obligation ... entered into with regard to a specific investment of a national of another Contracting Party.” It is the latter text that may be relevant to tax rulings.

Question

- a) To what extent, if at all, should additional protection encompass tax obligations?