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

**SUMMARY RECORD**

**Meeting on 29-31 January 1997**

# NEGOTIATING GROUP ON THE MULTILATERAL AGREEMENT ON INVESTMENT

## SUMMARY RECORD

29-31 January 1997

### Designation of Bureau Vice-Chairman

The Negotiating Group welcomed Mr. Kenichi Suganuma, Head of Delegation of Japan, as Vice-Chairman of the Negotiating Group, replacing Mr. A. Saiki.

### 1. Adoption of the Agenda

The Group adopted the agenda [DAFFE/MAI/A(97)1].

### 2. Approval of the Summary Record of the meeting held on 18-20 December 1996

One delegation requested modification of paragraph 5, Item 5 relating to Labour Matters in the MAI, as follows (changes are indicated in bold):

"b) a specific provision along the lines of paragraph 2 of Article 1114 of the NAFTA stating that Parties **should not** relax domestic **core** labour standards in an effort to encourage foreign investment;"

At the request of the delegation, a new paragraph has been added after the third paragraph on Item 7, point 5) Investment Incentives, to read:

**"One delegation emphasised that its support of this approach was prefaced on the assumption that tax measures are carved-out, and that, as with other measures, country specific exceptions were permitted."**

One other delegation requested that an additional sentence be added to the end of paragraph 2, Item 4, Regional Economic Integration Organisations, as follows:

**"Some delegations expressed serious concern over the inclusion of a carve-out for REIOs and pointed out that if there were such a carve-out appropriate payment would be required."**

The Chairman said that in order to avoid future debate, the Summary Records would concentrate on the Chairman's conclusions.

The Group approved the Summary Record [DAFFE/MAI/M/(96)7] as amended.

### 3. Reports by: DG3, EG3, EG4, and EG5

The Chairs of the Drafting and Expert Groups presented the results of their Groups' work.

The reports by Drafting Group 3 [DAFFE/MAI/DG3(97)2] and Expert Group 5 [DAFFE/MAI/EG5(97)2] provided a basis for advancing the work on the definition of investor/investment

(see item 4, below). The Chairman recalled that these two Groups were scheduled to meet in February and March, respectively. The Group approved the revised mandate for Drafting Group 3 (see item 11, below) which will continue in operation.

The report by Expert Group 3 [DAFFE/MAI/EG3(97)3] indicated that progress had been made in narrowing down options and clarifying the understanding of country positions on all of the issues within its mandate. The Group was able to produce draft text in some cases, and agreed on the way to proceed for some of the other issues. The Chairman noted that EG3's mandate was completed but asked Mr. Ahnlid to pursue informal consultations on outstanding issues.

Mr. Ahnlid later reported that further in-depth discussions had taken place concerning privatisation, performance requirements and concessions. Progress had been made, but further work was still necessary.

The report by Expert Group 4 [DAFFE/MAI/EG4(97)2] focused on the question of associating the OECD Guidelines with the MAI. The Group put forward elements of a text which reflected a range of views on the relationship between the MAI and the Guidelines. The Chairman took note that further work was needed before a final text could be agreed. While observing that EG4's mandate was terminated, he requested Mr. Bridge to pursue informal consultations on these outstanding questions (see item 7, below).

#### **4. Definitions of Investor and Investment**

The Negotiating Group considered the definitions of investor and investment, taking account of the reports by Drafting Group 3 and Expert Group 5. This issue was further advanced by informal consultations in DG3 which took place on 30 January [see DAFPE/MAI/DG3(97)3] to discuss a proposal by three delegations [DAFFE/MAI/DG3/RD(97)5]. Contributions by two other delegations [DAFFE/MAI/DG3/RD(97)6] were also circulated.

The Chairman thought that this work had laid a solid foundation for finalising a definition of investor/investment which could serve as a working hypothesis. He put forward a Chairman's text which reflected the progress made in the Expert/Drafting Groups.

The Negotiating Group agreed that the Chairman's Text on the definitions of investor and investment [DAFFE/MAI(97)7] would provide the basis for its further work on the MAI. The text recognises that further work is necessary as concerns safeguard provisions, indirect investment, intellectual property, concessions, public debt, and real estate. Delegations called attention to the importance of resolving those outstanding issues. The Chairman noted the remark by two delegations that the issue of the geographical scope of the MAI also required resolution.

#### **5. General Exceptions**

The Chairman invited delegations to comment on the options set out in his note [DAFFE/MAI(97)3] which distinguished between essential security interests and public order measures. He took note of two delegations' views that these exceptions should be treated in a similar manner. He also noted the preliminary remarks by three delegations that cultural measures should be included in an MAI article on general exceptions. While this discussion did not address that concern, neither did it prejudice the way in which cultural issues should be treated.

**Essential security interests.** The Chairman recognised the sensitivity and importance of this issue for all delegations. It was clear that the MAI would need to include a general exception for these types of measures. There were divergent views on whether the list should be closed or open but many delegates expressed serious concerns with an open list which could more easily be subject to abuse. One delegation mentioned the GATT/GATS approach as a model for the MAI. However, for other countries this might need to be balanced with some procedural controls, i.e., notification/transparency.

The Chairman concluded that option 1 (a self-judging exception with a closed list) seemed to provide the best basis for further work, with a majority of countries favouring that option - or a variant thereof which could include consultations. Four countries preferred option 2 (a self-judging exception with an open-list). Many delegations also wanted to consider the possibility of including a general anti-abuse clause.

**Public order measures.** The Chairman thought that the need for a public order exception was not clear to the majority of delegations. While an effort had been made by those in favour of a public order exception to explain the rationale for such measures, many delegations remained unconvinced. One delegation recalled its written contribution on this topic [DAFFE/MAI/DG2/RD(96)2] and agreed to further elaborate on the examples provided in that note. Other delegations that want a public order exception were invited to do the same.

The Chairman did not want to foreclose discussion on this issue and noted that many of the delegations in favour of a public order exception agreed that it should be subject to stringent safeguards, as proposed in the note by the Chairman.

## **6. Dispute Settlement**

The Negotiating Group addressed the questions raised in the Chairman's note [DAFFE/MAI(97)4] concerning the scope of the dispute settlement procedures.

The Chairman noted that a large majority of countries could support his conclusions that dispute resolution through binding state-to-state arbitration will be available for resolving disputes regarding MAI obligations. This will also be the working hypothesis for investor-to-state disputes, including on pre-establishment. He requested that dispute settlement experts consult on the list of possible limitations to the application of dispute settlement as set out in the Chairman's note.

Mr. Baldi reported later in the meeting that these informal consultations had confirmed that the distinction between pre and post establishment is not pertinent for dispute settlement. Furthermore experts agreed that:

- To be accorded standing in MAI arbitration proceedings an investor or state will need to allege actual (or likely) loss or damage.
- Only MAI parties and investors from MAI countries will have standing in dispute settlement.
- Remedies should go beyond a declaration that a measure is incompatible with MAI obligations or that a MAI Party has failed to meet its obligations under the agreement. However, many delegations felt that remedies should be limited to actual loss or damage, excluding the possibility of awards of damages for potential profits.

The Chairman hoped that Mr. Baldi's findings could alleviate the concerns of those delegations which still maintained reservations concerning the application of investor-state dispute settlement to pre-establishment.

## **7. Selected Issues from EG4 on Institutional Matters**

The Group addressed the questions raised in the Note by the Chairman [DAFFE/MAI(97)5] relating to ratification and entry into force of the MAI and decision-making by the Preparatory and the Parties Group.

The Chairman noted that a large majority favoured option 2 for ratification and entry into force. This would provide more flexibility than option 1. It would set a target date for entry into force and a date at which the signatories meet to determine whether the critical mass of ratifying countries had been reached. Considerable interest was expressed in a proposal that the critical mass assessment should be made by two-thirds majority decision, rather than consensus.

Concerning the voting rule by the Preparatory and Parties Group, the Chairman concluded that there should be a general rule of consensus, although majority voting on certain questions such as budgetary matters, could be acceptable. Views were divided on which questions could be decided by consensus and which by majority voting. The Chairman noted concerns by some delegations about the potential for blocking associated with the consensus rule.

Responding to an enquiry by one delegation, the Chairman stated that questions relating to the budget for the Parties Group Secretariat and the formula for sharing the costs among the Parties should be taken up by the Preparatory Group and should not be decided between now and the Ministerial Meeting in May.

The Chairman asked delegates to meet informally with Mr. Bridge, to work out texts reflecting these discussions and to report back to the Negotiating Group.

Later in the meeting, Mr. Bridge confirmed that option 2 would provide the basis of work for further refining the text on ratification and entry into force. He also reported that more work was needed to identify matters for which majority voting would be acceptable.

Mr. Bridge informed the Negotiating Group that experts had also further considered the elements of a text for associating the OECD Guidelines to the MAI. While some critical choices have still to be made, experts were considering elements, including language to refer to the Guidelines in the Preamble to the MAI; to annex the text of the Guidelines to the Final Act or to the MAI itself; and to express the expectation that non-OECD countries adhering to the MAI would also join in both the Declaration recommending the Guidelines to MNEs and the follow-up procedures, including the designation of national contact points. Most countries preferred to leave the follow-up procedures in the OECD framework rather than transfer them to the MAI Parties Group, although the Parties Group may be given a say in any revision of the text of the Guidelines.

## **8. Conflicting Requirements**

The Chairman noted the comments by delegations concerning the revisions to the proposed articles on conflicting requirements and secondary investment boycotts, as put forward by one delegation and by one other delegation [DAFFE/MAI(97)1/ATT]. He recognised that delegations are engaging in bilateral and multilateral consultations, including discussions outside of the MAI negotiations, to try to deal with these issues. The Chairman noted that all delegations were prepared to continue this dialogue in the plenary meetings as well as on higher political levels. The Negotiating Group agreed to return to these issues at its future sessions.

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

### **a. Agendas for February and March 1997**

The Group approved the draft agendas for 26-28 February 1997 and for 24-27 March 1997 [DAFFE/MAI/RD/(97)5]. The agendas are attached as Annex 1.

### **b. Future meetings**

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

### **c. Revised mandates**

The Negotiating Group approved the revised mandate for DG3 as set out in Annex 3.

## ANNEX 1

### MAI Draft Agendas for February and March 1997

#### 26 - 28 February 1997

1. Report by DG3
2. Selected Issues on:
  - a. Special Topics
  - b. Institutional Matters
  - c. Dispute Settlement
3. Liberalisation and the lodging of country specific reservations
4. Sub-National Measures
5. Other issues based on contributions from delegations

Lunch topic: (27 February) Overview of the Agreement: Main outstanding issues

#### **Informal Consultations**

Feb 24-25 Special Topics  
Feb 24-25 Dispute Settlement  
Feb 26-28 Topics to be announced

#### **Drafting/Expert Groups**

Feb 24-25 DG3

#### 24-27 March 1997

1. Reports by the Drafting/Expert Groups
  - a. DG3
  - b. EG2 on Taxation Matters
  - c. EG5 on Financial Services Matters
2. Selected Issues on
  - a. Special Topics
  - b. Institutional Issues
  - c. Dispute Settlement
3. Liberalisation and the lodging of country specific reservations
4. Other issues based on contributions from delegations

Lunch Topic: (25 March) Overview of the Agreement: Main outstanding issues  
Organising the Remainder of the Negotiations

#### **Informal Consultations**

March 24-27 To be announced

#### **Drafting/Expert Groups**

March 13-14 EG5 on Financial Services Matters  
March 19-21 EG2 on Taxation Matters  
March 24-27 DG3 (on dates and topics to be announced)

ANNEX 2

**Remaining dates**

**April 21-25**

**May 12-16**

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ANNEX 3

**REVISED MANDATE FOR DRAFTING GROUP N° 3**

1. The Drafting Group, open to the participation of all delegations, is charged with drafting proposed solutions to the outstanding issues in the consolidated texts and commentaries.
2. The Group will make proposals for text where appropriate, on issues concerning intellectual property, including artistic and literary property.
3. The Group will also prepare draft text for :
  - a. a preamble to the MAI, and
  - b. a provision which calls for MAI countries not to lower standards in order to attract investment.
4. The Group will report to the Negotiating Group on items 2 and 3 in February 1997, and on other topics as appropriate.