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

**SUMMARY RECORD**

**Meeting on 29-30 October 1997**

## **MAI NEGOTIATING GROUP**

### **SUMMARY RECORD**

**29-30 October 1997**

#### **1. Adoption of the Agenda**

The Negotiating Group adopted the agenda [DAFFE/MAI/A(97)8].

#### **2. Approval of the Summary Record of the meeting held on 18-19 September 1997**

The Group approved the Summary Record [DAFFE/MAI/M(97)7].

#### **3. Contributions from Delegations**

The Chairman noted a written contribution from one delegation containing a follow-up proposal for an environmental review of the MAI [DAFFE/MAI/RD(97)50]. The proposal was discussed under the agenda item on labour and environment, below.

#### **4. Labour and Environment**

The Chairman reported on the meeting held on 27 October to discuss the MAI with non-governmental representatives from environmental and consumer groups. In his opinion, there had been a constructive exchange of views and he noted that some Member country delegations had indicated a willingness to study further some of the proposals set out in the NGO joint statement [DAFFE/MAI/RD(97)55]. The Chairman urged that the dialogue begun with NGOs continue in different ways, particularly intensified contacts at national level. He announced his intention to explore informal means, such as meetings of the Bureau with NGOs, and left open the possibility of another meeting of negotiators with NGOs prior to conclusion of the MAI.

Regarding discussion of his note [DAFFE/MAI(97)30], the Chairman saw growing consensus on how to tackle environment and labour issues in the MAI based on the three anchor approach of the preamble, text, and association of the Guidelines. He proposed a “package” of future work which included environmental reviews of the MAI to be carried out by individual delegations, studies to be undertaken jointly by the OECD Secretariat, and the further refinement of texts by Drafting Group 3. The Group noted the comments by one delegation [DAFFE/MAI/RD(97)52]. After some discussion, the Chairman’s proposal, including the timing for finalising this work and reporting to the NG, was agreed [DAFFE/MAI/RD(97)51] (see Annex 1).

#### **5. Conflicting Requirements**

Several delegations intervened to stress the importance of finding a satisfactory solution to the issues relating to conflicting requirements and secondary investment boycotts. The Chairman noted that important discussions were underway but that it was too early to draw any conclusions. The Negotiating Group therefore was not in a position to discuss the outcome of this work but hoped that results would soon be forthcoming which could be examined by the Group.

## **6. Progress on Informal Consultations**

The co-ordinator of the consultations on concessions, Mr. Varkonyi, noted that delegations had focused on the question of a special transparency provision relating to concessions. He informed the Negotiating Group that most delegations did not see the need for such a provision given the requirements of the transparency article of the MAI. Delegations recognised, however, the link with the definition of monopolies under discussion in the Special Topics group, and with the definition of investment. The issue of the treatment of natural resources in the MAI was not discussed.

The Negotiating Group Chairman thanked Mr. Varkonyi for his report and invited him to hold another round of informal discussions in December to review matters that had been raised last September by one delegation. The results of the consultation should be considered at the December round of informal consultations on Special Topics.

An informal consultation on de facto discrimination had been co-ordinated by Mr. Hotta, who reported that the majority of delegations were of the view that it is not possible, nor desirable, to attempt to define the concept of de facto discrimination even if it is clearly part of the National Treatment obligation. De facto discrimination should be assessed in light of the specific circumstances of individual situations. There was also general agreement that it would be difficult for an investor to prove the “intent” of a measure so this criterion should not be retained as a single determinant of “de facto discrimination”. Rather, both the intent and the effect of a measure are important elements in assessing the circumstances of particular situations. Mr. Hotta thought that delegations might be ready to examine a proposal for interpretative language in this regard.

The Chairman thanked Mr. Hotta and welcomed the possibility to review, at the next meeting of the Negotiating Group, a proposal for an interpretative note on de facto discrimination. This could be included in the Chairman’s Guidelines for the Lodging of Country Specific Reservations [DAFFE/MAI(97)29] to provide clarity, but the Chairman reminded delegations that they were responsible in the end for their own reservations.

The Chairman noted that reports were being prepared on informal consultations on Intellectual Property [DAFFE/MAI(97)32], Special Topics [DAFFE/MAI/ST(97)13/REV1], and Dispute Settlement [DAFFE/MAI/DS(97)9].

## **7. Exceptions, Derogations and Reservations**

The Chairman invited delegations to exchange views on the lists of national reservations and to reply to the questions raised in his note [DAFFE/MAI(97)31].

He noted questions by delegations which revealed that there is still a need to clarify some issues such as those relating to professional services and qualifications, residence requirements, performance requirements, and the relation of the MAI to other agreements concluded in air transport, for example. The Chairman thought that some of these issues should be discussed bilaterally but others, including how to deal with professional services should be discussed in informal consultations to try to come to common understandings. He invited Dr. Karl (Germany) to co-ordinate an informal consultation during the December meetings looking at professional services issues.

As to the questions posed in his paper, the Chairman agreed that exceptions in the MAI will be necessary, but he wondered whether there could not be some way to discipline exceptions so that they are not totally open-ended. He referred particularly to a statement by one delegation which had made specific

proposals for disciplines which, if accepted, could be generally applicable to measures taken in the context of a REIO as well as to other types of exceptions from the full disciplines of the MAI. He invited delegations to reflect on this statement and to further consult among themselves.

The Chairman looked forward to receiving the revised lists of country specific reservations from all countries so that these can be discussed in December. He agreed with the remark of one delegation that the different legal forms for lodging reservations and for allowing departures from disciplines are less important than the total substantive effect of the MAI. He invited delegations to be flexible and keep an open mind as to the precise form that reservations or exceptions might take.

### **Next Steps/Other Business**

#### ***Future Meetings***

The Group agreed to propose to BIAC and TUAC to hold a special one-day consultation in January 1998.

The Group approved the draft agendas for 1-5 December and 12-16 January [DAFFE/MAI/RD(97)53]. The agendas are attached as Annex 2.

## Annex 1

### Conclusions on Labour and Environment

#### A. Environmental Review

1. Delegations will examine /continue to examine the implications of the MAI for the capacity to make and implement environmental law and policy. Delegations are invited to communicate the results of their findings to the Negotiating Group either orally or in writing.

2. The Secretariat will:

a. survey available literature examining the relationship between foreign direct investment and the environment, including the impact of environmental standards on investment decisions and the role of multinational enterprises; and

b. examine the relationship between the MAI and existing and proposed multilateral agreements on the environment.

This work will be conducted jointly by DAFPE, the Environment Directorate and the Legal Directorate.

#### B. Text

Drafting Group N° 3 will refine existing text or develop options for text, without prejudice to the “three anchor” approach and without attempting to make political choices, inter alia, in the following areas:

1. Preamble.

2. “Not lowering standards”, including the possible need for separate text on labour and environment.

3. A clause taking into account Article XX in the GATT, paragraph 4 in the draft MAI Article on Performance Requirements and NAFTA, paragraph 1114(1).

#### C. Next Steps

1. The studies referred to in “A.2” above should be available to the Negotiating Group at its meeting in December.

2. The Negotiating Group will review the results of “A” and “B” at its meetings in January, and decide on any further work that may be needed. The Negotiating Group will also give further consideration to encouraging Parties to undertake environmental impact assessments of environmentally sensitive projects.

3. Delegations are invited to consult between investment and environment experts in this work.

## Annex 2

### Draft Agendas for December 1997 and January 1998

#### 1-5 December 1997 \*

1. Contributions from Delegations
2. Progress in DG3 and Informal Consultations
3. Labour and Environment Matters
4. Guidelines for Multinational Enterprises
5. Exceptions, Derogations and Reservations

Lunch topic (3 Dec) Relations with non-members  
Preparation of the High Level meeting (February 1998)

- 1 Dec (PM) Concessions
- 1 Dec (am) and  
2 Dec Special Topics
- 1-2 Dec Bilateral Consultations
- 2-3 Dec Intellectual Property
- 4 Dec Taxation
- 4 Dec DG3
- 3 Dec Professional Services

#### 12-16 January 1998

1. Contributions from Delegations
2. Progress in DG3 and Informal Consultations
3. Financial Services
4. Labour and Environment Matters
5. Exceptions, Derogations and Reservations
6. Conflicting Requirements
7. Dispute Settlement
8. Preparation of the High Level meeting (February 1998)

Lunch topic (15 January) Relations with non-members  
Preparation of the High Level meeting (February 1998)

- Bilateral Consultations
- DG3
- Dispute Settlement
- Financial Services
- Consultations with Business and Labour

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\*. The Negotiating Group will meet in Plenary on 3 and 5 December.

## TENTATIVE SCHEDULE OF MEETINGS

1998

12-16 January

16-20 February: including High Level Meeting (17-18 February)

16-20 March

14-17 April

[For Information: 27-28 April - OECD Council at Ministerial Level]