



Negotiating Group on the Multilateral Agreement on Investment (MAI)

**AIDE MEMOIRE OF THE MEETING OF THE NEGOTIATING GROUP
ON THE MAI HELD ON 30 JUNE - 2 JULY 1997**

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The Negotiating Group discussed the note by the Chairman concerning Liberalisation and the Lodging of Country Specific Reservations note [DAFFE/MAI(97)26].

The Chairman recognised that sufficient time should be devoted to advancing on country specific reservations, both bilaterally and in a multilateral context. He also acknowledged that achieving a satisfactory balance of commitments in the MAI depends not only on country specific reservations but also on the standards to be realised in the text of the treaty.

The Chairman noted that almost all delegations could accept the principle of standstill as a basic working hypothesis and that reservations should have a juridical base. Some deviation from standstill will almost certainly be necessary, particularly for some of the special topics. The article dealing with the lodging of reservations would, in all likelihood, need to provide for that possibility. The deviations from standstill should nevertheless be narrow and precisely circumscribed in the reservations. It would be helpful to look at GATS article XXI on Modification of Schedules which allows the introduction of new restrictions provided there is adequate compensation.

The Chairman requested delegations to begin preparing revised lists of country specific reservations which should be finalised after the September meeting of the Negotiating Group. To assist delegations, the Chairman also intends to circulate Guidelines on generic or technical issues. Finally, he invited Drafting Group No.3 to continue working on the article on the lodging of country specific reservations and to report back to the Negotiating Group in September.

The Chairman summarised the discussion of the Negotiating Group on environmental and labour matters [DAFFE/MAI(97)11]. He noted that all delegations recognised the importance and political sensitivity of these issues and that their treatment in the MAI will be subject to public scrutiny during the ratification process.

The Chairman underlined the view of many delegations that the MAI is first and foremost an investment agreement which aims at the creation of jobs and economic wealth and at improving the allocation of resources. These goals should not conflict with environmental and labour standards. The Chairman noted that a large majority of delegations thought that dealing with environment and labour matters in the MAI was necessary and desirable, and for some, simply unavoidable. There were, however, four countries who continue to express strong opposition to addressing these issues in the MAI.

The Chairman concluded that given the weight of opinion, it is likely that the MAI will deal with environment and labour and he confirmed growing support for the approach already identified by the Negotiating Group, as set out in his note. One delegation made an extensive presentation of additional elements which it thought could be included in the agreement. The Chairman noted in particular a proposal to include a provision along the lines of NAFTA, article 1114 (paragraph 1) and the idea of allowing for environmental impact statements. Several delegations welcomed these proposals and stated they were interested in going further than what is now in the MAI. Delegations would be prepared to consider the proposals further once they had been formally submitted to the Group.

Although the basic approach to these issues continues to enjoy broad support, there were different views on how to articulate the three elements.

The Chairman discerned support for including references in the preamble to other international standard setting organisations such as the ILO and the RIO Declaration, and to the OECD Guidelines.

Concerning the provision on not lowering standards, the Chairman noted a shift in positions towards the acceptance of such a provision in the MAI. Some eleven or twelve delegations had said they would favour, or could accept, making this provision a binding one; others wanted the provision to remain a best efforts commitment. Many delegations mentioned problems relating to the application of dispute settlement to such a provision and the Chairman agreed that further work was needed to identify solutions. It also needed to be examined further whether "not lowering standards" was the appropriate language or whether the clause should rather refer to "not derogating from" domestic standards.

The Chairman noted that many delegations would agree to associating the Guidelines to the MAI while preserving their non-binding character. It might also be appropriate to require all MAI Contracting Parties to nominate national contact points. He thought that the need to maintain the integrity of the Guidelines was an important factor to bear in mind when considering any future revision of the Guidelines or other follow-up work.

The Chairman recalled that it may be necessary to relate the accession process in some way to the environmental and labour provisions that are being considered for inclusion in the MAI. He noted broad support for his proposal that the Negotiating Group meet with Non-governmental Organisations (NGOs) at its October meeting.

The Chairman invited countries to consult together, especially those with opposing views, to try to narrow differences.

The Chairman introduced a proposal for discussion on General Exceptions. While delegations were not in a position to offer definitive views on this proposal, the Chairman noted their preliminary reactions.

The proposal for discussion addressed essential security interests and measures taken to protect public order.

The Chairman concluded that a general exceptions provision in the MAI will need to address measures taken by Contracting Parties to protect essential security interests. He did not yet see full consensus on whether this provision should include public order but this could still be part of the final package. The Chairman noted the remark by three delegations that the provision should also include cultural measures.

As concerns essential security interests, the Chairman concluded that while there are differing views as to how broad this exception should be, many delegations were of the opinion that the GATT and GATS models should serve as precedents. Other delegations argued that the MAI should try to break new ground by strengthening the conditions under which such exceptions may be taken and by including mechanisms to limit abuse. At its last discussion on this matter, the Chairman had noted a majority in favour of an essentially self-judging provision with a closed list. While self-judging was generally accepted to mean that formal dispute settlement mechanisms could not be invoked, some controls should be applied particularly as concerns transparency and consultation procedures. Further consideration could be given to strengthening the proposal to examine ideas put forward by delegations, including a GATS (Article XXII) type multilateral consultation mechanism.

On public order, the Chairman noted that some delegations would like broader GATS type public order provisions. Others said the MAI should state more explicitly that dispute settlement would apply to such measures. One delegation was of the opinion that if the public order provision of the GATS as such was taken over in the MAI, this would already go beyond the GATS because of the application of the MAI investor-state dispute mechanism.

The Chairman requested delegations to give further thought to improving the proposal for discussion, taking account of the views expressed.

The Negotiating Group briefly discussed possible exceptions to MFN. The Chairman recalled that a proposal had been submitted for an article which included an MFN exception for measures taken by Regional Integration Economic Organisations (REIO). He noted the contribution by some delegations regarding paragraph 4 of the proposal by one delegation.

The Chairman recognised that further work needs to be done and he proposed to initiate an informal discussion with interested delegations. He noted the offer by one delegation to submit precise questions which would help focus the concerns of some delegations relating to a REIO clause. A paper responding to these questions would be prepared.

The Chairman agreed to come back to this once there has been an opportunity to examine this paper, perhaps in the context of informal consultations.

Financial Matters

The Chairman noted the report on the informal consultations on financial matters held on 9-10 June, 1997. He noted further that the questions this group has been discussing have not been fully resolved. He agreed that further consultations may be useful in the Fall. Final resolution of financial services matters may have to await the outcome of the financial services negotiations in Geneva.

Drafting Group No.3

Drafting Group No.3 met on 30 June to consider certain financial services issues which might be of general application for the MAI. The Negotiating Group noted DG3's report and agreed that DG3 should meet again in September to complete the drafting of the clause for the lodging of country specific reservations and to pursue the issues it had discussed in May and June 1997.

Special Topics

The Chairman noted that informal consultations had been held on 30 June-2 July. He invited Mr. Ahnlid to hold a further meeting in September. The Negotiating Group could then take up the issues in October. The Chairman also indicated that he might ask a small group to try to find solutions to outstanding problems.

Taxation

The Chairman noted that the treatment of taxation matters in the MAI has not yet been resolved. The Group agreed that Mr. Sukanuma should chair informal consultations among taxation and investment experts in September on possible solutions to the outstanding problems, including on the issue of dispute settlement procedures for taxation matters.

Intellectual Property

The Chairman noted that informal consultations took place on 1-2 July and invited Mr. Gero to try to make further progress in this area. The Negotiating Group should take stock of this work in the Fall.

Institutional Matters

Mr. Bridge informed the Group that a report on the outcome of informal consultations held in May concerning decision making in the MAI was now available. The Chairman noted that the Negotiating Group would need to return to these issues.

a. Observers

The Negotiating Group agreed to invite Brazil and Slovakia to become observers to the Negotiating Group, in accordance with OECD procedures, as of the Group's meeting in September. The Negotiating Group also authorised the Chairman to recommend that Chile also be invited as an observer as soon as Chile's formal request has been received.

b. Chairmanship of Drafting Group No.3

The Chairman asked the French delegation to convey, on behalf of the Negotiating Group, the sincere appreciation for the work which Mr. Jerome Haas (France) had accomplished as chairman of Drafting Group No.3. The Group agreed to appoint Mr. Marinus Sikkel (Netherlands) to replace Mr. Haas as chairman.

c. Future meetings

The Group approved the draft agendas for 15-19 September and on 27-31 October, including a Special Session for non-Member countries on 17 September and a meeting with NGO's on environmental matters in October. The agendas are attached as Annex 1.

Annex 1

Draft Agendas for September and October 1997

15-19 September^{*}

1. Contributions from Delegations
2. Taxation
3. Dispute Settlement
4. OECD Guidelines for Multinational Enterprises
5. Reports on DG3 and Informal Consultations
6. Liberalisation and country specific reservations

Lunch topic: (18 Sept) Relations with Non-Member countries
Overview of the Agreement: Main Outstanding Issues

- 15-16 Sept DG3
- 15-16 Sept Special Topics
- 15-16 Sept Taxation
- 17 Sept Bilateral Consultations
- 17 Sept Conference with Interested Non-Member countries
- Concessions

27-31 October^{**}

1. Contributions from Delegations
2. Special Topics
3. Labour and Environment Matters
4. Conflicting Requirements and Related Matters
5. Reports on DG3 and Informal Consultations
6. Liberalisation and Country Specific Reservations

Lunch topic: (28 Oct) Relations with Non-Member countries
Overview of the Agreement: Main Outstanding Issues

- 27 Oct DG3
- 28-29 Oct Intellectual Property
- 30 Oct Meeting with Non-Member countries
- 30 Oct Meeting with NGOs on Environment
- 30-31 Oct Bilateral Consultations
- Concessions
- Financial Matters

* The Negotiating Group will meet in plenary only on 18-19 September

** The Negotiating Group will meet in plenary only on 28-29 October