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Organisation de Coopération et de Développement Economiques  
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**Or. Eng.**

**DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**  
**COMMITTEE ON CAPITAL MOVEMENTS AND INVISIBLE TRANSACTIONS**  
**COMMITTEE ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES**

**Joint Meeting**

**AIDE MEMOIRE**

**RESULTS OF THE FIRST TWO MEETINGS OF THE NEGOTIATING GROUP ON  
THE MAI ON 26-27 SEPTEMBER AND 24-26 OCTOBER 1995**

**25975**

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At its first meeting on 26-27 September 1995, the Negotiating Group (NG) elected Mr. F. A. Engering, Director General for Foreign Economic Relations in the Economic Affairs Ministry of the Netherlands as chairman. It also elected two vice-chairmen: Mr. A. P. Larson, Deputy Assistant Secretary for Economic and Business Affairs at the United States Department of State and Mr. A. Saiki, Director of the OECD Division in the Economic Affairs Bureau of the Japanese Ministry of Foreign Affairs.

The Negotiating Group then held a discussion on **procedural arrangements** for carrying out the negotiations. The Negotiating Group agreed that working procedures should be flexible and respond to the dynamics of the negotiations. The NG would be the forum for negotiations and the decision-making body. It might create "drafting groups" or "working groups" comprised of technical experts to provide assistance as required. These groups, open to all NG participants, would be created for short periods for the purpose of carrying out specific tasks. The NG would remit questions to the experts when it considered particular issues ripe for the drafting of texts or for other purposes. Reports would then be submitted to the NG for discussion and decision.

The Negotiating Group agreed to meet every six weeks in principle. Drafting, or working groups, would meet in the same week as the Negotiating Group, but may need to hold additional meetings. Many Delegations expressed a strong preference for avoiding parallel meetings of the groups and the Negotiating Group.

Delegates noted that the Negotiating Group and any of its subsidiary bodies would follow the working methods (e.g. simultaneous interpretation, translation of documents, distribution via OLIS etc.) which apply to all OECD bodies.

The Negotiating Group agreed that it will prepare written reports to the Council meetings at Ministerial level in 1996 and 1997. The chairman, or a vice-chairman of the NG, stands ready to make periodic oral reports to the Council at the level of Permanent Representatives.

The Negotiating Group agreed that the WTO should become a permanent observer in the Group. Other international organisations which had expressed an interest in observer status, such as ECT, IMF, World Bank Group (ICSID, MIGA ...), could be invited on an ad hoc basis and whenever the NG felt they could make a particular contribution to the issue under discussion. The NG could decide, however, to hold a meeting without the presence of observers whenever it so desired.

The Negotiating Group noted the extensive preparatory work carried out by Member countries and the CIME/CMIT and agreed to make use of this existing expertise, whenever possible. The Negotiating Group agreed that the CIME/CMIT should serve as the main forum for consultations on the MAI with other OECD committees, with BIAC/TUAC and with other non-governmental organisations. However, the Bureau might decide to establish informal contact with BIAC and TUAC, as necessary.

Information on the progress of the negotiations for non-Members in the process of accession to OECD Membership (PITs and Korea) would continue to be provided by the CIME/CMIT. The Negotiating Group recommended that the Council invite these countries to participate in future Committee discussions on the MAI.

For other non-Member countries, contacts would be assured by the CIME/CMIT through a variety of outreach activities, such as the DNME workshops, the Advisory Group on Investment (AGI) and the Emerging Market Economies Forum. Officers of the Negotiating Group may participate in these activities.

The Negotiating Group discussed the various issues to be addressed in the course of the MAI negotiations, as identified so far by the preliminary work on the MAI. Delegates agreed that selected issues concerning scope and definitions, the treatment of an investor and an investment, taxation, investment protection, and dispute settlement will first be discussed in the Negotiating Group. They adopted a programme of work through December 1995 reflecting the order in which the Group would discuss these issues.

The Negotiating Group created a Drafting Group on Selected Topics concerning Investment Protection to be chaired by Mr. Jérôme Haas (France) charged with preparing specific investment protection provisions (see attached mandate, annex 1). The Drafting Group would report back to the Negotiating Group in December.

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The second meeting of the Negotiating Group took place on 24-26 October 1995. The Group discussed issues concerning the **definition of investment and investor** in the MAI.

Delegations agreed that the discussions should be guided by the overall objective set out in the CIME/CMIT Report to Ministers, i.e., that the MAI should be "comprehensive in scope, covering all sectors under a broad definition of investment focusing mainly on FDI". Some Delegations pointed out that an agreement covering only FDI would not adequately capture today's business environment. On the other hand, too broad a definition of investment might raise concerns that the MAI would overstep its "investment" mandate.

Many Delegations recalled the importance of the linkage between the definitions of investment and investor and the specific obligations of the agreement, especially those concerning the treatment of investments and investors, pre and post establishment, which were still to be discussed.

In summarising the Group's discussion, the Chairman noted that, in principle, a single, broad definition of investment should be adopted covering tangible and intangible assets, including real estate and intellectual property. He recalled that some delegations thought that portfolio investment should be covered only if related to an economic activity. The Chairman suggested that the definition could include an illustrative list of what assets would be considered as an "investment" under the agreement.

Concerning the definition of investor, the Chairman concluded that many issues still had to be fully explored, including:

- the use of nationality or permanent residence as a basis for defining the investor;
- establishing the location of the investor through either the control or the territoriality principle;
- deciding whether the definition should include the concept of "making an investment";
- the implications of MFN obligations in both the MAI and BITS, especially as concerns the unintentional extension of benefits to parties outside the MAI;
- the use of a "denial of benefits" provision.

The Group agreed that the definition of investment and the investor needed to be examined on the basis of a Note by the Chairman which would identify common ground, suggest draft language and formulate questions that still need to be addressed. The Group agreed to take up this discussion at its meeting in January 1996.

The Group also discussed issues relating to **the treatment of investors and investments (pre/post-establishment)**. The principles of **national treatment, non-discrimination and MFN** are the cornerstones of the MAI.

In considering these principles, the Chairman made the following observations:

- the principles of national treatment should be clear and precise and defined in full and unconditional terms;
- the principles should apply to all phases of investment;
- they should address de facto as well as de jure discrimination;
- national treatment/non-discrimination/MFN for the pre and post-establishment phases could be drafted as a single article, although some delegations wanted consideration of different provisions for pre- and post-establishment;
- reciprocity is incompatible with MFN and should be avoided;
- the implications of the qualification "in like circumstances" needed to be addressed;
- the problem of "free-riders" arising from the MFN obligations in the instrument needed careful consideration;
- any exceptions or reservations to national treatment or non-discrimination/MFN would need to be considered in the context of the overall imperative of a balance of commitments among MAI parties;
- it should be considered how market access concerns can be addressed.

The Group decided to remit these questions to a Drafting Group on selected topics concerning the treatment of investors and investment (see below).

The Chairman's summary of the discussion noted that **standstill** is a basic obligation which already exists in the Codes and should be maintained, either explicitly or implicitly.

Some Delegations felt that a standstill should not simply codify the status quo, but that "up-front" liberalisation of existing restrictions would be essential to generate the political support necessary for ratification of the agreement. Some other Delegations thought that engaging in negotiations on the reduction of existing restrictions might distract Member countries from agreeing on the new rules.

Some Delegations asked whether standstill should apply to "new areas" such as key personnel, corporate practices.

The Chairman proposed that the Group reconsider, at a later time, the idea of developing a standstill agreement to be adopted by the Ministers in Spring 1996.

Some Delegations thought that **rollback** should be expressed both as a general principle and as a mechanism to reduce non-conforming measures before and after the MAI takes effect. It could be another way to ensure an equitable balance of commitments among the parties to the MAI.

But questions were raised about how rollback commitments would be expressed; when rollback would take place; at what pace; whether this would change the nature of the OECD. Different mechanisms for achieving rollback were proposed including: specific time-table for rollback, automatic phase out of non-conforming measures, peer pressure, and subsequent rounds of negotiations on non-conforming measures.

As to **transparency**, the Chairman recalled that several delegations proposed that the MAI should contain a transparency requirement combined with a review process to ensure updating of information provided by MAI parties. While transparency should include the notification of non-conforming measures, it would be necessary to consider:

- the level of detail that this notification requirement would entail;
- what other relevant measures should be published;
- what would be the function of "enquiry points" as proposed by one delegation.

The Group decided that it would re-examine the issues relating to standstill and rollback together with rules concerning country specific reservations at its meeting in December.

Delegations identified three types of **general exceptions**: national security, international peace and security, and public order.

As concerns national security, the Chairman concluded that any such exceptions should be strictly limited in number; narrowly defined in order to avoid abuse; non-discriminatory in application and subject to a control mechanism, through review or transparency requirements.

The Group examined the reasons underlying general exceptions based on international peace and security and public order. The Chairman proposed that the Group consider further what measures were intended to be covered by such exceptions and whether discrimination against foreign investors could be justified.

The Secretariat was requested to look at the clarification regarding national security which had been arrived at in the context of the exercise to strengthen the National Treatment instrument in 1991 and to review the clauses relating to this exception in other international treaties.

The Group also discussed **country specific reservations**. It was suggested that the number of such reservations should be strictly limited and that they should be defined as narrowly as possible. Some Delegations also raised the question how to achieve a reduction of reservations; if this could be done on a basis of negotiations, or if some other approach would be more appropriate.

From the discussion, the Chairman identified the following principles which might be applied to the MAI:

- a requirement that all reservations be listed in the agreement and that no additional reservations could be introduced;
- no reservations on the basic principle of most-favoured-nation treatment;
- no reservations on the protection obligations, and the narrowest possible list of reservations on investment in the pre-establishment phase;
- reservations should apply on a non-discriminatory basis;
- all reservations should be temporary, in principle, and subject to continued liberalisation;
- all reservations should be subject to the transparency mechanism.

These suggested principles would require further discussion.

Concerning **temporary derogations**, the Chairman noted that the Group had identified only one possible basis for derogations, i.e. that relating to balance of payments difficulties. The arguments in favour of permitting derogations on this basis would be more persuasive if a broad definition of

investment were adopted. Others felt that even a broad definition would not justify derogations on this basis.

Delegations held different views of whether the accession by non-Member countries should influence the decision on whether or not to include such a derogation.

The Group agreed to re-examine these issues in December, on the basis of a written version of the Chairman's Summary of the discussion so far.

The Group requested that the Secretariat update the CIME/CMIT Survey of Controls and Impediments to FDI, if possible broadening this survey to include portfolio investment. It invited the CIME/CMIT to review the updated survey and to report back to the Negotiating Group before the summer of 1996.

Following an exchange of views on the **issues arising in connection with taxation under the MAI**, the Group decided to hold an "orientation debate" on taxation issues at its January session. Once the orientation discussion had taken place, a Drafting Group would be created to identify and analyse the taxation issues arising under the MAI and to propose ways of dealing with them, within the terms of a mandate to be specified by the Negotiating Group in January.

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The Negotiating Group agreed to meet on 6 December (afternoon) until 8 December (concluding at lunch time) and it approved draft agendas for the December and January meetings (see Annexes 2 and 3, respectively).

The Negotiating Group decided to create a Drafting Group on selected topics concerning treatment of investors and investment (pre and post establishment) under the chairmanship of Mr. Hantke (Germany). It approved a mandate for the Drafting Group (see Annex 4) and requested that it report back to the NG in March 1996.

ANNEX 1

MANDATE OF DRAFTING GROUP ON

"SELECTED TOPICS CONCERNING INVESTMENT PROTECTION"

1. The Drafting Group, open to the participation of all delegations, is charged with drafting specific investment protection provisions to be included in the MAI.
2. Topics:
  - General Standard of Treatment
  - Expropriation
  - Compensation
  - Transfer of Funds
  - Protection from strife
  - Subrogation
3. The Group will submit proposals for texts to the Negotiating Group at its session in December 1995.
4. The Group will terminate after its report to the Negotiating Group, unless the Negotiating Group decides otherwise.

ANNEX 2

DRAFT AGENDA OF THE NEGOTIATING GROUP ON THE MAI

6-8 DECEMBER 1995\*

1. Scope of the Agreement
  - Territorial scope of application
2. Treatment of Investors and Investments
  - a. General Exceptions
  - b. Reservations, Standstill and Rollback
  - c. Temporary Derogations
3. Investment protection
  - a. Report of Drafting Group
  - b. Protecting investor rights arising from other agreements
4. Dispute Settlement
  - a. Consultation and conciliation
  - b. State-to-State
  - c. Investor-to-State
5. Next steps

\*\*Lunch topics: a) Application of the agreement to all levels of government, b) measures taken in the context of regional economic integration organisations

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\* The Negotiating Group will start at 3 pm on 6 December and finish by 1 pm on 8 December. The IMF is to be invited to send an expert to attend the first half-day session at which item 2 c. will be discussed.

\*\* For Heads of Delegation.

ANNEX 3

DRAFT AGENDA OF THE NEGOTIATING GROUP ON THE MAI

25-26 JANUARY 1996

1. Taxation
2. Definitions of Investment and Investor
3. Special topics:
  - a. Key Personnel
  - b. Performance requirements
  - c. Incentives
  - d. Technology/R&D
4. Next steps

\*Lunch topics: Privatisation and Monopolies/State-owned enterprises

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\* For Heads of Delegation.

ANNEX 4

MANDATE OF DRAFTING GROUP ON

"SELECTED TOPICS CONCERNING TREATMENT OF  
INVESTORS AND INVESTMENT (PRE/POST ESTABLISHMENT)"

1. The Drafting Group, open to the participation of all delegations, is charged with drafting specific provisions to be included in the MAI on selected topics concerning the treatment of investors and investment (pre/post establishment).

2. Topics:

a. National Treatment

b. Non-discrimination/MFN

c. Transparency

\*d. Standstill

\*e. Rollback

National Treatment and Non-discrimination/MFN should be defined in full and unconditional terms.

3. The Group will submit proposals for texts to the Negotiating Group at its session in March 1996.

4. The Group will terminate after its report to the Negotiating Group, unless the Negotiating Group decides otherwise.

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\* Discussion of these items in the Drafting Group will be held over until guidance is received by the Negotiating Group in December 1995.