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

**AIDE MEMOIRE OF THE MEETING OF THE NEGOTIATING GROUP  
ON THE MAI HELD ON 14-15 MARCH 1996**

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The chairman of Drafting Group 2 introduced the report on the Treatment of Investment and Investors. He reported that the Group had arrived at agreed text on the elements of "national treatment", "non-discrimination/MFN" and "transparency" obligations except for a small number of issues in square brackets. The text is designed to apply to both pre and post-establishment although some delegations had expressed a preference for separate texts.

There was also agreement on mechanisms to achieve standstill, rollback and the listing of country specific reservations. The Drafting Group also identified a variety of rollback mechanisms which might operate before and after the MAI comes into force. Delegations views are further apart as concerns a general exceptions article. In particular, the extent of the national security exception (self-judging or subject to limitations), as well as the need for an exception to take account of public order are still under discussion. Mechanisms to prevent abusive recourse to the general exception provisions are also under consideration.

In his presentation, the Drafting Group Chairman noted that many of the outstanding issues were of a political nature and might be resolved only later when discussions on the MAI obligations are further advanced.

The Chairman thanked the Drafting Group and its Chairman for the report and noted the concern of some delegations that discussion of outstanding issues not be put off too long. He proposed that the Negotiating Group consider a consolidated version of drafting group reports at its meeting in June.

The Negotiating Group then discussed the question whether obligations on national treatment and MFN are sufficient to bring about effective equality of competitive opportunities for foreign and domestic investors alike, notably when both domestic and foreign firms are confronted with the same restrictions or regulatory requirements. Some delegations argued in favour of a provision in the MAI, such as those in the GATS, to deal with barriers to investment that would not be caught by the national treatment obligation.

Many delegations thought that further work on this issue would be necessary before deciding whether the MAI should contain specific provisions. They noted that the concept of "market access" needed to be defined in an investment context and that this would determine the kinds of non-discriminatory barriers that could be captured by the MAI. Some also cautioned against being too ambitious given the short time available to conclude the negotiations.

A proposal was circulated recommending that the MAI contain a "prudential measures" clause enabling Parties to adopt measures necessary to safeguard the integrity of financial markets and the protection of investors.

The Chairman proposed that further discussion take place to delimit the nature of the problem to be addressed and to identify the most obvious non-discriminatory barriers in order to decide what could be done on a practical basis. He was of the opinion that, in considering possible solutions, a good starting point would be the disciplines in other international agreements (NAFTA, GATS, OECD Codes).

Drafting Group 1 on selected topics concerning investment protection met on 11-12 March to consider the open questions which it had identified in its report to the Negotiating Group in December

1995. The Group reported that no changes had taken place with respect to these open questions. An addendum to the report contains a comment concerning expropriation and compensation and a comment on the determination of "fair market value".

Some delegations commented that they had come prepared to discuss the open questions in the DG1 report; but most delegations felt that they would not be in a position to do so until such time that other core elements concerning the treatment and definition of investors and investments had been consolidated with the investment protection elements.

The Chairman also saw these questions as part of an integrated package and he suggested delaying consideration of the report until such time that the other issues had been presented to the Negotiating Group. This could be taken up in June.

Drafting Group 1 reported on the question of provisions which might be included in the MAI on investor rights arising from other agreements. It agreed that its mandate dealt with rights arising from agreements between investors and states, rather than from other treaties. It also agreed that the mandate did not include the question of a provision stating that the more favourable of the MAI or those investor-state agreements prevailed. The Drafting Group concluded that a discussion of concepts was necessary and that final drafting would have to follow basic choices to be made by the Negotiating Group.

The Chairman noted that positions were divided on this question and that further consideration was needed in conjunction with other elements of the MAI, including the definition of investment and dispute settlement. He proposed that this be put on the Negotiating Group agenda for June.

The Chairman recognised that privatisation is likely to continue to be of particular interest to foreign investors and proposed that national treatment and MFN obligations of the MAI could apply to all phases of privatisation. Contributions from some countries were broadly in line with the objective of guaranteeing non-discriminatory treatment between foreign and domestic investors during privatisation.

Delegations reaffirmed that the decision to privatise is the prerogative of each State. Privatisation operations should be subject to rules under the MAI, though it may not be possible to apply MAI disciplines in full to all aspects of privatisation. Most delegations considered that national treatment and MFN should apply fully to transactions in the shares of already privatised enterprises. Views were more divided as to whether these obligations should also apply to all initial sales.

The Chairman concluded that there might be a case for special provisions concerning small scale operations and sales to employees. Recourse to "golden shares" and "hard core shareholder groups" may also require special attention although the Chairman believed that such arrangements are not generally discriminatory against foreign investors. He noted that delegations were not fully convinced that standstill and rollback obligations could apply in all cases. He noted that there were questions over the role of dispute settlement and that national security was also mentioned as a relevant concern.

The Chairman proposed referring the issue of privatisation to an expert group for further elaboration.

The Group considered whether the MAI should cover monopolies and state enterprises. One country raised the issue of the definition of monopolies as well as the need to address concessions with the objective of limiting discrimination between foreign and domestic investors. Several delegations commented that the existence of state enterprises or monopolies should not be challenged.

The Chairman noted a majority of delegations in favour of provisions which would apply to any delegated regulatory powers that a monopoly or state enterprise may have, including the awarding of concessions. It was less clear how far the MAI could go in "regulating", without going too deeply into competition policy, the "behaviour" of government-designated monopolies -- whether publicly or privately owned -- to ensure that they do not discriminate with respect to the purchase or sale of monopoly goods or services or abuse their dominant market position outside the scope of their exclusive rights. There was caution, however, over whether the MAI should go beyond the GATT Government Procurement Code (regarding the purchase of non-monopolistic goods by state enterprises and government-designated monopolies).

The Chairman concluded that disciplines on monopolies and state enterprises could include national treatment, MFN and transparency. To the extent that there would be any non-conforming measures covered by country specific reservations, standstill and rollback could apply in the same way that they apply to other reservations in the agreement -- not to the existence of monopolies. It remains to be seen whether a standstill obligation could apply to the creation of new public enterprises or monopolies.

The Chairman thought that most countries agreed with the principle that state enterprises should enjoy the full benefits of the agreement, with an additional proposal by one delegation that access to demonopolised sectors should be governed by reciprocity. He proposed referral to an expert group.

Actions taken by domestic enterprises, "corporate practices", can affect foreign investment. The Chairman recognised that it might be difficult to develop disciplines on these practices, particularly as concerns non-discriminatory practices. Most delegations concurred and were reluctant to interfere with the prerogatives of private entrepreneurs. Other delegations were of the opinion that the value-added of such disciplines might be outweighed by the costs of trying to develop them. One delegation suggested that where corporate practices undermine MAI obligations (or using the concepts of "nullification or impairment of benefits" developed in the GATS), there might be scope for dispute settlement or consultations procedures.

The Chairman proposed that further examination of this issue focus on identifying where something could be done without being too intrusive, perhaps trying to limit the most discriminatory practices. For instance, discriminatory rules in statutes and by-laws affecting foreign investors, where this results from legislation that explicitly requires or invites such behaviour, could be considered as inconsistent with the MAI. He recommended that further work be done in an expert group to explore possible substantive or procedural disciplines, including more transparency via country examinations and notifications (see item 6 below).

In a first informal round of discussion, delegations agreed that the report to Ministers should highlight the progress made so far; reaffirm the importance of concluding a high standard investment agreement within the time frame already agreed; underline the importance of outreach to non-Members, and seek Ministerial endorsement of these endeavours.

The Group approved the draft agendas for 18-19 April 1996 and for 19-21 June 1996. (See annex 1).

The Group agreed to create a new Expert Group on Special Topics and approved the mandate for this Group (see annex 2).

A list of meeting dates for 1996 and 1997 is provided in annex 3.



## ANNEX 2

### **Mandate for an Expert Group No. 3 on “Special Topics”**

1. The Expert Group, open to participation of all delegations, is charged with considering the relevant aspects of the following "special topics":
  - a. Key Personnel
  - b. Performance Requirements
  - c. Incentives
  - d. Privatisation
  - e. Monopolies/State Enterprises
  - f. Corporate Practices
2. The Group will make proposals, including proposals for text where appropriate, to the Negotiating Group at its session in September 1996.
3. The Group will terminate after its Report to the Negotiating Group, unless the Negotiating Group decides otherwise.

ANNEX 3

**TENTATIVE DATES FOR REMAINDER OF 1996**

April 15-19

June 17-21

September 9-13

October 21-25

December 9-13

**TENTATIVE DATES FOR 1997**

January 20-24

February 24-29

March 24-29

April 2-7