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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 18-19 APRIL 1996**

## **AIDE MEMOIRE OF THE MEETING OF THE NEGOTIATING GROUP ON THE MAI HELD ON 18-19 APRIL 1996**

At its 18-19 April 1996 meeting, the Negotiating Group heard a report by Drafting Group 2 on the Definition of Investors and Investments. It noted that important progress had been made but that many technical issues had not yet been fully examined for want of sufficient time and that the application of broad definitions would require further work.

Reflecting the widely shared view of the Drafting Group that additional progress could not be made without looking at how the definitions interrelate with other issues, the Chairman proposed that this report be considered jointly with the other reports from DG1 and DG2 at the Negotiating Group's meeting in June.

The Expert Group 1 on Dispute Settlement and Geographical Scope also reported that it had addressed the application of the MAI to overseas territories; the geographical scope of application of the MAI; and a conceptual framework for dispute settlement. Some issues were well advanced but others would require further guidance from the Negotiating Group. In particular, the scope of the MAI dispute settlement provisions had not yet been considered, and in the opinion of several delegations it would not be possible to advance further on the dispute settlement issues until that question had been fully debated at the level of the Negotiating Group.

The Chairman concluded that more progress was needed on other elements of the agreement before the Expert Group should be asked to resolve outstanding issues. He proposed to defer consideration of the elements set out in the Expert Group's report until after the June meeting of the Negotiating Group at which time there would be a discussion on issues arising from integrating DG1 and DG2 reports.

The Negotiating Group approved a Progress Report to Ministers describing the status of the negotiations so far and highlighting the issues which still must be resolved. The report invites Ministers to reaffirm their determination to reach an agreement by Spring 1997. It was forwarded to the OECD Council meeting at Ministerial level on 21-22 May 1996 and is available as a General Distribution document [OECD/GD(96)78].

Delegations remarked that the application of the MAI to different levels of government was a sensitive issue and agreed that it is central to the question of the overall balance of commitments in the agreement. Recent international agreements recognise that federal countries may not always be in a position to control areas which are under the competence of subnational authorities and provide for dispute settlement in the event that reasonable or necessary measures have not been effective. Several countries were of the opinion that certain aspects of this issue, for example, enforcement of obligations, apply to both unitary and federal states and will have to be addressed when the scope of the agreement and the nature of the dispute settlement mechanism are concluded. Questions relating to the application of provisions on exceptions, rollback, and standstill should be considered broadly and not treated as a separate discussion. The Chairman noted that different political and constitutional situations applied among federal states.

The Chairman stated that, while definitive solutions could not be found yet, the following steps could help to further understanding of this issue:

- (i) One of the existing drafting groups could be mandated to look into the issue of how the language relating to the application of the agreement at all levels of government could be drafted. This would be decided after the June meeting of the Negotiating Group when it will consider the issues arising from the consolidated reports of DG1 and DG2.
- (ii) More generally, the implementation of international treaties in national law needs further examination. This discussion could take place in Expert Group 1 based on a paper by the Secretariat analysing the issues. The Expert Group would then report back to the Negotiating Group.
- (iii) An important confidence building measure would be to engage in a periodic exchange of information in the Negotiating Group on the consultation process between subnational levels of government and central government authorities and the progress of those talks.

The Negotiating Group also discussed measures taken in the context of regional economic integration organisations. The Commission stated that in seeking a REIO clause the European Community would propose the application of certain principles to ensure that the clause is not an escape from MAI obligations. These principles include limiting the scope of the clause to that needed to cover the special requirements of the REIO and its members and applying certain criteria to determine which agreements would fall under the clause. The specific language of a clause will have to wait until the MAI obligations are decided.

For a considerable number of delegations, this issue also relates to the question of a balance of commitments in the MAI and has legal and confidence building implications as well. Further consideration will have to be given to the question whether the MAI should include a REIO clause. There was concern with the possibility that a growing number of regional organisations would claim similar exceptions from MFN.

The Chairman noted these concerns and thought that the search for a solution should be guided by the goal of achieving a high standards agreement. The Chairman was of the opinion that the debate had helped clarify the issue, especially the policy rationale that underlies the importance that the European Community attaches to a REIO clause. He did not think it possible now to reach any conclusions as to the inclusion, or not, of a REIO clause nor as to its potential scope.

Taking up the suggestions of some delegations, the Chairman agreed that Expert Group 1 could include the European Union in its study of the issues relating to the implementation of international agreements in national. He supported the proposal that the EC should make available factual information on existing restrictions to investment in areas where European Community law is applicable.

Outreach. The Chairman could see common ground on the idea of making outreach activities more concrete and structured. The Negotiating Group Bureau was willing to engage in more frequent and in-depth briefings with interested non-Member countries on the occasion of Negotiating Group meetings. Apart from special and ad hoc meeting activities, information could also be disseminated through making available notes prepared by the Chairman for Negotiating Group debates as well as the aide-memoires of the meetings. Non-Members could be invited also to present written comments on any of these issues. This could provide an effective vehicle for substantive exchanges of views which would be mutually beneficial in preparation for accession.

Accession. The Chairman noted broad consensus that accession to the MAI should be open to any country willing and able to meet the obligations and that there should be no additional criteria for

membership. There is still the necessity to define the standards for participation, perhaps on the basis of a set of "core" principles or conditions and a level of reservations that would be comparable to that of the Parties. Transition periods could also be considered.

The Negotiating Group should study the feasibility of setting up an expert group to define the "standards", or minimum requirements for accession. This group could also examine the general accession principles that could be included in the MAI and the more detailed rules which could be left to a Parties Group to determine. Accession procedures, including voting rules (e.g., consensus/weighted majority), in other international agreements such as the WTO, could provide useful guidance, although the Chairman noted a preference for OECD-type consensus.

The Negotiating Group welcomed the preliminary Inventory of Investment Measures transmitted by the CMIT/CIME in response to the request made by the Group in support of the MAI negotiating process and commended the Committees for their work. It noted nevertheless the CMIT/CIME delegates' wish to avail themselves of the possibility of revising the document to complete and harmonise country contributions as appropriate.

The Chairman proposed that the Negotiating Group postpone its discussion of the Inventory until its June 1996 session at which time it could take into account the latest information available and consider how analytical work might be carried forward.

The Group approved the draft agendas for 19-21 June (beginning at 2:30 on the first day) and for 11-13 September (beginning in the afternoon of the first day). The agendas are attached as Annex 1.

A tentative list of meetings for 1996 and 1997 is attached as Annex 2.

## ANNEX 1

### MAI: Draft Agendas for September and October 1996

#### **11 (p.m.)-13 September 1996**

1. Report by EG3 on Special Topics
2. Relationship to other International Agreements
  - a) WTO Agreements (including GATS, TRIMS and TRIPS)
  - b) IMF Agreement
  - c) Bilateral, Regional and Sectoral Agreements
  - d) OECD Codes
  - e) OECD Declaration and Decisions
3. Implementation of the agreement (including a "Parties Group")
4. **Progress Report by DG3 on the Definition, Treatment and Protection of Investors and Investments**
5. Financial Matters under the MAI (**including prudential matters and BOP derogation**)

Lunch topic (12 September): **Environment Matters**  
**Outreach to Non-Members**

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

24-26 June DG3 on Definition, Treatment and Protection of Investors and Investments  
9 - 11 (am) Sept EG3 on Special Topics (third meeting)  
16-18 (am) Sept DG3 on Definition, Treatment and Protection of Investors and Investments  
**18 (p.m.) - 20 Sept EG1 on Dispute Settlement and Geographical Scope**

#### **23 (p.m.) - 25 October 1996**

1. **Final Report by DG3 on Definition, Treatment and Protection of Investors and Investments**
2. **Selected Issues arising from the Report by EG3 on Special Topics**
3. **Progress Report by EG1 on Dispute Settlement and Geographical Scope**
4. **Progress Report by EG2 on Taxation Matters**
5. **Non-discriminatory barriers**
6. **Cultural Matters**
7. **Environmental Matters**
8. **Analytical inventory of investment measures**

Lunch topic (24 October): **Liberalisation: Approach and Package**  
**Labour Matters**

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

14-16(am) Oct EG4 on Institutional Issues and Relations with other International Agreements (first meeting)  
16(p.m.) - 18 Oct EG2 on Tax Matters  
21-23 (am) Oct EG1 on Dispute Settlement and Geographical Scope

## ANNEX 2

### **TENTATIVE DATES FOR REMAINDER OF 1996 and 1997**

December 9-13

\* December 16-20

January 20-24

February 24-29

March 24-29

April 2-7

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\* The Negotiating Group will meet in the week 16-20 December to avoid conflict with the Singapore Ministerial Meeting of WTO.

ANNEX 3

**MANDATE FOR DRAFTING GROUP N° 3 ON THE “DEFINITION, TREATMENT AND PROTECTION OF INVESTORS AND INVESTMENTS”**

1. The Drafting Group, open to participation of all delegations, is charged with preparing proposed solutions to the outstanding issues in the consolidated texts and commentaries prepared by Drafting Groups No. 1 and No. 2, taking account of guidance provided by the Negotiating Group.
2. The Group will report to the Negotiating Group at its sessions in September and October 1996.
3. The Group will terminate after its Report to the Negotiating Group, unless the Negotiating Group decides otherwise.

Chair: Mr Jérôme Haas (France)

## ANNEX 4

### **REVISED MANDATE FOR “EXPERT GROUP N° 1 ON DISPUTE SETTLEMENT AND GEOGRAPHICAL SCOPE”**

1. The Group, open to participation of all delegations, is charged with considering the relevant aspects of dispute settlement, taking account of discussions in the Negotiating Group especially regarding the scope of dispute settlement, under the following headings:
  - a. Consultation and Conciliation
  - b. State-to-State
  - c. Investor-to-State
2. The Group will also consider
  - a. The geographical scope of the agreement
  - b. Issues arising from the consolidated text on the definition and treatment of investors and investments, taking account of guidance provided by the Negotiating Group, in particular the options for dealing with the issue of the protection of investor rights.
  - c. The general question of implementing international treaties in national law.
3. The Group will make proposals, including proposals for text wherever possible. Priority will be given to proposals on state-to-state dispute settlement.
4. The Group will make a progress report to the Negotiating Group in October 1996 and a final report in December 1996.
5. The Group will review the existing OECD instruments on conflicting requirements at a September meeting and report back to the Negotiating Group by its October meeting.
6. The Group’s Mandate will terminate after its report to the Negotiating Group, unless the Negotiating Group decides otherwise.

Chair: Mr Marino Baldi (Switzerland)

ANNEX 5

**REVISED MANDATE FOR EXPERT GROUP NO. 2 ON THE  
“TREATMENT OF TAX MEASURES IN THE MAI”**

1. The Expert Group, open to participation of all delegations, is charged with examining all matters relating to the treatment of tax measures in the MAI.
2. The Group will meet in October and December. On the basis of a “carve-out”/“carve-in” approach which is the subject of an emerging consensus, the Group will make proposals, including proposals for text whenever possible, to address the treatment of tax measures in the MAI.
3. The Group will make a progress report to the Negotiating Group in October 1996 and a final report in December 1996.
4. The Group’s Mandate will terminate after its Report to the Negotiating Group, unless the Negotiating Group decides otherwise.

Chair: Mr Eduardo Revilla (Mexico)

Vice Chair: Ms Mary Ryckman (United States)

## ANNEX 6

### **MANDATE ON LIBERALISATION MATTERS**

**(To be included in the Summary Record of the Negotiating Group's June meeting)**

The Negotiating Group invited the Secretariat to prepare a systematic presentation of the measures identified in the analytical inventory [DAFFE/MAI(96)15/REV1] classifying measures by type of restriction and by sector, and to report to the Negotiating Group in October 1996.