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

**REPORT TO THE NEGOTIATING GROUP ON INTELLECTUAL PROPERTY**

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This report on Intellectual Property issues presents the results of the informal discussions among IP experts held on 13 and 14 January 1998. This report focuses on the points of agreement and disagreement. Previous reports (DAFFE/MAI(97)32 and DAFTE/MAI/IP(97)2) outline in more detail the issues involved.

### **1. New Papers**

1. One delegation circulated a new paper.

### **2. Transfers**

2. Agreed: text on collective management charges should be added to the first sentence in paragraph 2 of the Commentary on Transfers (DAFFE/MAI(97)1/REV2, p. 125) after “purposes”: “, or any authorised deduction by an entity charged with collective management of intellectual property rights.”
3. Not agreed: whether the modified paragraph should remain in the Commentary or be placed in the text of the Agreement.

### **3. Monopolies**

4. Agreed: the definition of “monopoly” (now in DAFTE/MAI/ST(97)14, p. 26, but which fails to reflect the previous recommendation of IP experts set out in DAFTE/MAI(97)32, p. 3) should be amended to refine the definition’s treatment of intellectual property rights:

“Monopoly” means any person or entity designated by a [national [or subnational] government authority] [Contracting Party] as the sole supplier or buyer of a good or service in a relevant market in the territory of a Contracting Party, but does not include a person or entity that has an exclusive intellectual property right, concession, licence authorisation or permit solely by reason of such right or exercise of such right [nor does it include an entity charged with the collective management of intellectual property rights].

5. Not agreed: as indicated by the final bracketed phrase, whether entities charged with collective management of IPRs should also be excluded from the definition.

### **4. Performance Requirements**

6. Agreed: paragraph 1(f) (set out in DAFTE/MAI/ST(97)14, p. 10) requires explicit reference to the transfer of IPRs. Not agreed:

- (a) whether the current wording of paragraph 1(f) adequately covers future IPRs and moral rights; and
- (b) whether paragraphs 1(b) and (c) have an impact on IPRs.

## **5. Expropriation**

7. Agreed: text is needed to ensure that certain IP management and legal provisions do not constitute expropriation.

8. Not agreed: flowing from proposed text:

“The creation, limitation, revocation, annulment, statutory licensing, compulsory licensing and compulsory collective management of IPRs, the withholding of authorised deductions by an entity charged with the collective management of IPRs, and the sharing of remuneration between different holders of IPRs are not expropriation within the terms of this agreement, to the extent that they are not inconsistent with specialised IPR conventions.”

- (a) whether there should be a specific IP text or reliance on a general text clarifying that expropriation does not include normal government regulatory activity;
- (b) whether and how the statement should be qualified;
- (c) whether that list of actions should be exhaustive or illustrative;
- (d) whether the current wording adequately covers future rights;
- (e) whether the question of consistency with IPR agreements should be worded positively;
- (f) whether a specific IP text should be in the text of the Agreement, in an interpretative footnote or in the Commentary; and
- (g) whether the word “creation” adequately covers the intended concept.

## **6. National Treatment, MFN Treatment and General Treatment**

9. Agreed: MAI obligations should not extend NT/MFN obligations in existing IP agreements.

10. Not agreed:

- (a) whether there should be a NT/MFN exception through a link to existing IP agreements;
- (b) whether there should be a NT/MFN exception to MAI obligations for IPRs;
- (c) whether the eventual solution should also be applied to the General Treatment articles; and
- (d) the applicability of the MAI obligations with respect to future IPRs.

## **7. Definitions of “Investment” and “Investor”**

11. Agreed: there needs to be clarification of the definition of “investment”. The required clarification is tied to the resolution of the eventual substantial MAI obligations for IPRs.

12. Not agreed:

- (a) whether the definition of “investment” should be limited to those IPRs included in the TRIPS Agreement;
- (b) whether it should exclude copyrights and related rights;
- (c) whether it should include future IPRs;
- (d) whether it should include only the “economic aspects” of IPRs;
- (e) whether it should include only those rights provided domestically; and
- (f) what implications the definition of “investor” has for an IP “rightsholder”.

## **8. Dispute Settlement**

13. Agreed: IP experts wish to limit forum shopping and conflicting jurisprudence with the WTO.

14. Not agreed:

- (a) how to achieve these goals;
- (b) the desirability of applying investor-state dispute settlement to IPRs; and
- (c) whether the existing MFN obligations in the TRIPS Agreement create the risk of “free-riders”.

## **9. Information Transfers and Data Processing**

15. Agreed: there are concerns that the text of the generalisation of financial services (DAFFE/MAI/DG3(97)15, p. 10, footnote 3, and DAFTE/MAI/DG3(97)17, p. 2) has implications for IPRs, and may have to be amended or deleted to take these concerns into account.

## **10. Exhaustion of Rights**

16. Not agreed: whether there needs to be any language on this issue to ensure that the MAI does not create new obligations in this area.