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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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1. On 24-25 March, 1997, delegations conducted informal consultations on intellectual property. The discussions covered the issues identified in the report that Drafting Group No. 3 presented to the Negotiating Group in February [DAFFE/MAI/DG3(97)4] as well as some new issues. With the objective of advancing work on intellectual property, several delegations tabled new texts that helped clarify the issues and focus discussion.

### The Definition of Investment

2. Virtually all delegations recognised the need for further examination of the concept of intellectual property in the definition. Delegations stressed that decisions on definition are closely linked to the resolution of the substantive problems discussed below. Delegations had varying views on whether the MAI should have an open or closed definition of intellectual property. Of those delegations that proposed a closed definition, some thought that the definition should cover only those rights specified in the TRIPS agreement and others thought that other existing rights should also be covered. Several delegations thought that the definition should exclude copyright and neighbouring rights and databases. In addition, delegations had varying views on whether the definition should cover future as well as existing intellectual property rights. Some delegations thought that it would be important to reflect footnote 2 of the Chair's text on the Definitions of Investment and Investor [DAFFE/MAI(97)7]. That footnote contemplates that an asset, to qualify as an investment, must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.

### National Treatment, Most Favoured Nation Treatment and General Treatment

3. All delegations agreed that the current formulation of National Treatment and Most Favoured Nation Treatment in the MAI goes beyond existing national and international practice for intellectual property. Delegations formulated three possible approaches. The MAI could provide that National Treatment and MFN:

- (a) would apply to intellectual property without qualification (derogations would be addressed through country-specific reservations);
- (b) would have no application to intellectual property; or
- (c) would apply to intellectual property, but a MAI Party could derogate from NT and MFN in a manner consistent with the TRIPS Agreement and, perhaps, other intellectual property agreements.

4. Virtually all delegations that expressed an opinion supported either approach (b) or (c). Of those delegations, many want to consider whether the approach should also be applied to the MAI provision on General Treatment. In addition, some delegations thought that the concepts of "use" and "enjoyment" in the NT, MFN and General Treatment provisions should not apply to intellectual property.

### Expropriation and Transfers

5. Delegations thought that the MAI could significantly improve the existing international law on intellectual property through its investment protection provisions - in particular, the expropriation provisions - although some delegations thought that additional clarification on the actual value added would be helpful. In addition, some delegations expressed the view that the concepts of direct and indirect expropriation and the concept of a measure having an equivalent effect to expropriation should not cover certain intellectual property practices, such as the issuance of compulsory licenses or the revocation, limitation or creation of intellectual property rights, that are permissible under TRIPS and, perhaps, other intellectual property agreements. Delegations identified three approaches protecting these practices:

- (a) make no specific provision in the MAI on the assumption that the MAI provision on expropriation would not be interpreted so as to cover these practices;
- (b) refine the concepts of “equivalent effect” and “indirect expropriation” to ensure that they do not apply to these practices; or
- (c) draft a provision stating that the concepts of expropriation and measure having equivalent effect shall not apply to practices consistent with TRIPS and, perhaps, with other international agreements.

6. Some delegations thought that the provisions of the MAI on Transfers will have no adverse impact on intellectual property practices. However, other delegations expressed concern that these provisions may force some MAI Parties to ensure that certain payments are freely transferable in a manner inconsistent with their intellectual property regimes. Particular concern was expressed about the possible impact of the Transfer provisions on collective management regimes. Delegations considered that this issue will require further study to determine whether there is a problem and, if so, how the problem might be solved.

### Performance Requirements

7. Delegations agreed that restrictions on performance requirements should not cover a requirement that is imposed, or a commitment or undertaking that is enforced, by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws regarding intellectual property rights or to act in a manner not inconsistent with other provisions of the MAI. Currently, there is a square-bracketed text to this effect in the draft MAI text. One delegation proposed that the words “court, administrative tribunal, competition authority” be followed by “or other competent authorities”. A large number of delegations also believed that restrictions on performance requirements should also not cover use of intellectual property rights without the authorisation of the rights holder, to the extent that such use is consistent with the TRIPS Agreement. Finally, one delegation had concerns about the meaning of the phrase “proprietary knowledge”.

### Monopolies

8. Delegations agreed that the definition of monopolies should continue to include bracketed text that would exclude from the definition an entity that has been granted an exclusive intellectual property right solely by reason of such grant. Delegations thought that this issue will require further study to determine whether there is a problem and, if so, how the problem might be solved.

### Dispute Settlement

9. Delegations noted that Expert Group No. 1 is addressing issues arising from the relationship between dispute settlement under the MAI and under other international agreements. Some delegations doubt that overlap between dispute settlement systems gives rise to issues that are unique to the field of intellectual property. Other delegations are concerned that intellectual property may indeed require special attention. In particular, the concerns that were expressed included conflicting panel decisions on TRIPS provisions, the applicability of investor to state dispute settlement to intellectual property and possible problems with forum shopping. These delegations want to consider the issue of dispute settlement further.

### Other Issues

10. During the discussion, delegations identified a number of issues that are new and that require further consideration:

- (a) does the definition of investor as applied to the holder of a right in intellectual property give rise to any issues that need to be addressed;
- (b) when does an intellectual property right take on the characteristics of an investment;
- (c) does the status of a rights holder give rise to any issues that must be addressed with respect to the MAI provisions on key personnel;
- (d) will the MAI contain provisions on corporate practices that might give rise to intellectual property concerns; and
- (e) will the MFN provision of TRIPS be triggered by any substantive or procedural provisions of the MAI and, if so, what is the impact?

### Next Steps

11. Delegations made substantial progress in identifying and understanding the issues that the MAI raises with respect to intellectual property. The group felt that, following consultations in capitals, it will be possible to proceed to a discussion focused on resolving differences of principle concerning the problems identified.