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

**Drafting Group No.3 on Definition, Treatment and Protection of Investors and Investments**

**SUMMARY RECORD**

**Meeting on 26 March 1997**

**DG N° 3 ON DEFINITION, TREATMENT AND PROTECTION  
OF INVESTORS AND INVESTMENTS**

**Summary Record of meeting  
held on 26 March 1997**

**1. Adoption of the Agenda**

The Group adopted the Agenda [DAFFE/MAI/DG3/A(97)3].

**2. Approval of the Summary Record**

The Group approved the Summary Record of the meeting held on 24-25 February 1997 [DAFFE/MAI/DG3/M(97)2].

**3. Provision on Not Lowering Standards**

The Drafting Group:

- considered a Note by the Chair [DAFFE/MAI/DG3(97)5] and the February Report to the Negotiating Group [DAFFE/MAI/DG3(97)4]
- prepared two possible texts on this issue, together with explanatory footnotes, and agreed to forward these to the Negotiating Group (see item 6 below).

**4. Article on Lodging Country Specific Reservations**

The Drafting Group:

- considered a Note by the Chair [DAFFE/MAI/DG3(97)6],
- held a preliminary discussion, summarised in the attached Aide-memoire, and concluded that the issue would need further consideration at the next meeting of the Drafting Group.

**5. Intellectual Property**

On 24 March 1997, a meeting of intellectual property and investment experts was held that produced a Report to the Negotiating Group on this subject [DAFFE/MAI/(97)13].

**6. Report to the Negotiating Group**

A written report was produced and presented to the Negotiating Group at its meeting on 27 March 1997 [DAFFE/MAI/DG3(97)7].

**7. Future Work/Other Business**

The Group agreed to meet again in April.

*Aide-Memoire*

**Draft Article on the Lodging of Country Specific Reservations**

1. The Drafting Group held a brief preliminary discussion of this matter on the basis of a Note by the Chair [DAFFE/MAI/DG3(97)6]. The following notes record some of the main observations made.
2. The Group agreed that its objective was to prepare the text of a draft article, together with any necessary commentary. The Drafting Group did not need to resolve the important policy issues outstanding in regard to the lodging of reservations as these were under discussion in the Negotiating Group. The existing commentary in the Chairman's note should not be considered as a first draft of the commentary to be prepared by the Group; in particular, paragraph 5 in the existing text should be disregarded.
3. It was agreed that part A of the draft article was needed as the core provision to "grandfather" existing non-conforming measures and prevent the introduction of more restrictive measures ("standstill").
4. Different views were expressed with respect to part B of the draft article which would allow new non-conforming measures to be introduced after the Agreement comes into force. One view was that such a provision might undermine the MAI disciplines to which it applied. The opposite view was that part B would make it easier to preserve high standards in the disciplines of the agreement by allowing flexibility to countries in lodging their reservations.
5. Different views were also expressed regarding the disciplines against which reservations should be permitted. While some favoured an open list, others argued for a limited closed list of disciplines comprising National Treatment, MFN and new disciplines (special topics). It was suggested that the disciplines listed in the chapeau text of parts A and B should remain incomplete for the time being pending political decisions by the Negotiating Group.
6. In part A of the draft article, subparagraphs a) and c) seemed broadly acceptable to most delegations on a first reading. Subparagraph b) also attracted support although some questioned the need to provide for the possibility that parliaments might fail to renew laws immediately.
7. It was suggested that the term "measure" should be defined and reference was made to the definitions used in NAFTA<sup>1</sup>, GATS<sup>2</sup> and the transparency article in the MAI [DAFFE/MAI(97)1, page 11]. One delegation objected to the use of the transparency definition which was said to be unsuitable for the purpose of lodging reservations.
8. Another suggestion was that reservations should be lodged with respect to "treatment" as this was the term used in the National Treatment and MFN articles. Others considered this approach unsatisfactory.

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1. NAFTA Article 201: Definitions:

"**measure** includes any law, regulation, procedure, requirement or practice";

2. GATS Article XXVIII:

"**measure** means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form";

9. The question was raised whether national law or the description of the measure in the reservation would define the limits of Parties' obligations under the MAI. Delegations underlined the need for certainty in this regard and reference was made to the four introductory paragraphs of Annex I to NAFTA (reproduced as an attachment to this note). This discussion drew attention to the important relationship between the Article itself and the form and content of the country reservations.

10. Questions were raised about whether the provisions of the draft article, especially part A, could be applied uniformly to all levels of government and to regional economic integration organisations.

11. Finally, it was proposed to add a provision to protect existing investments in the event that those investments had been established under conditions more favourable than those guaranteed by the reservations of the country concerned. NAFTA contains a provision along these lines<sup>3</sup>.

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3. NAFTA Article 1108 (4) (Reservations and Exceptions):  
“No Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.”

**NAFTA - Reservations for existing measures and liberalisation commitments**

**Annex I**

1. The Schedule of a Party sets out, pursuant to Articles 1108(1) (Investment), 1206(1) (Cross-Border Trade in Services) and 1409(4) (Financial Services), the reservations taken by that Party with respect to existing measures that do not conform with obligations imposed by:

- a) Article 1102, 1202 or 1405 (National Treatment),
- b) Article 1103, 1203 or 1406 (Most-Favoured-Nation Treatment),
- c) Article 1205 (Local Presence),
- d) Article 1106 (Performance Requirements), or
- e) Article 1107 (Senior Management and Boards of Directors),

and, in certain cases, sets out commitments for immediate or future liberalisation,

2. Each reservation sets out the following elements:

- a) **Sector** refers to the general sector in which the reservation is taken;
- b) **Sub-Sector** refers to the specific sector in which the reservation is taken;
- c) **Industry Classification** refers, where applicable, to the activity covered by the reservation according to domestic industry classification codes;
- d) **Type of Reservation** specifies the obligation referred to in paragraph 1 for which a reservation is taken;
- e) **Level of Government** indicates the level of government maintaining the measure for which a reservation is taken;
- f) **Measures** identifies the laws, regulations or other measures, as qualified, where indicated, by the **Description** element, for which the reservation is taken. A measure cited in the **Measures** element
  - (i) means the measure as amended, continued or renewed as of the date of entry into force of this Agreement, and
  - (ii) includes any subordinate measure adopted or maintained under the authority of and consistent with the measure.

- g) **Description** sets out commitments, if any, for liberalisation on the date of entry into force of this Agreement, and the remaining non-conforming aspects of the existing measures for which the reservation is taken; and
- h) **Phase-Out** sets out commitments, if any, for liberalisation after the date of entry into force of this Agreement.

3. In the interpretation of a reservation, all elements of the reservation shall be considered. A reservation shall be interpreted in the light of the relevant provisions of the Chapters against which the reservation is taken. To the extent that:

- a) the **Phase-Out** element provides for the phasing out of non-conforming aspects of measures, the **Phase-Out** element shall prevail over all other elements;
- b) the **Measures** element is qualified by a liberalisation commitment from the **Description** element, the **Measures** element as so qualified shall prevail over all other elements; and
- c) the **Measures** element is not so qualified, the **Measures** element shall prevail over all other elements, unless any discrepancy between the **Measures** elements and the other elements considered in their totality is so substantial and material that it would be unreasonable to conclude that the **Measures** element should prevail, in which case the other elements shall prevail to the extent of that discrepancy.

4. Where a Party maintains a measure that requires that a service provider be a citizen, permanent resident or resident of its territory as a condition to the provision of a service in its territory, a reservation for that measure taken with respect to Article 1202, 1203 or 1205 or Article 1404, 1405 or 1406 shall operate as a reservation with respect to Article 1102, 1103 or 1106 to the extent of that measure.