



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Expert Group No.3 on “Special Topics”

CORPORATE PRACTICES

(Note by the Chairman)

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I. Introduction

1. The present Note discusses the subject of MAI disciplines on corporate practices drawing on the orientation debate held on this issue in the Negotiating Group at its March 1996 session, which was based on the Chairman Note DAFPE/MAI(96)10.
2. Government restrictions are not the only impediments to foreign investment. Actions taken by individual firms, that is "corporate practices", can also negatively impact on foreign investment. These practices can be made explicit, notably in the companies' articles of association and/or by-laws, or result from the behaviour of enterprises. They can discriminate against foreign investors or apply to particular categories of investors, including nationals.
3. The Negotiating Group concluded, however, that the MAI could focus on discriminatory corporate practices that appear in corporate articles of association or by-laws, notably restrictions on voting rights for foreign investors or transfers of shares to foreign investors. Company law would also be of interest in this context as a prerequisite for discriminatory practices in so far as such practices are permitted, or not forbidden, in company laws.

II. National Treatment and Most Favoured Nation Treatment

4. Laws, regulations or administrative practices which explicitly require, encourage or permit any given locally-incorporated company -- or companies generally -- to impose or administer restrictions on foreign investors' participation in the equity or capital base of this company would be contrary to the National Treatment and Most Favoured Nation Treatment provisions of the MAI since these practices could be regarded as substitutes for direct government restrictions on foreign investment. A different interpretation could potentially create a major loophole to the non-discriminatory rule of the MAI.
5. The same argument could be used for the inclusion of discriminatory restrictions, appearing in corporate statutes or company by-laws, on the resale of shares since this category of corporate practice may also act as a substitute to a governmental restriction against foreign investment.
6. It is understood that under the EU treaty, both types of practice are considered to be incompatible with the right of establishment granted to every EU investor operating in the European Community.
7. It is also for consideration whether prescribed discriminatory practices limiting the participation of non-nationals in boards of directors and management of a company should be captured by MAI

disciplines. This issue is related to the issue of MAI obligations on key personnel [see DAFPE/MAI/EG3(96)3/REV1].

Questions:

- *Should the National Treatment and Most Favoured Nation obligations extend to provisions in corporate articles of association and by-laws that discriminate against foreign investors?*
- *Should this be spelled out in a separate article to the MAI or would an interpretative note on the scope of application of the National Treatment and Most Favoured Treatment provisions be sufficient ?*

III. Transparency

8. The transparency provisions proposed by the Drafting Group N° 2 [DAFFE/MAI/DG2(96)2], would require a Contracting Party to "promptly publish or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application ..." which "may affect the operation of the Agreement". Public laws, regulations and procedures relevant to the corporate practices covered by the MAI would therefore be subject to this obligation. Contracting Parties would also be obliged to "...promptly respond to specific questions and provide, upon request, information to other Contracting Parties".

9. This transparency obligation would not extend to non-discriminatory corporate practices. These practices, are, in most cases, outside the reach of governments. It would not be possible to collect information about the practices of particular enterprises without direct collaboration of these enterprises. Even if this could be done, it would be necessary to take into account the limitations imposed by domestic law on the protection of privacy and the confidentiality of business information.

10. Experts may nevertheless draw on the techniques developed under existing OECD instruments to bring greater transparency in this area. Private practices are examined in the context of the OECD country examinations on foreign direct investment. These "peer" reviews provide the occasion to discuss particular problems and ways of addressing them.

Question:

- *Is there a need for specific transparency rules in the MAI in the case of corporate practices?*