



Negotiating Group on the Multilateral Agreement on Investment (MAI)

CORPORATE PRACTICES

(Note by the Chairman)

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1. Government restrictions are not the only impediments to foreign investment. Actions taken by domestic enterprises, often referred to as “corporate practices”, can also affect foreign investment.

2. One category of corporate practices concerns *derogations to the principle of "proportionality"* which occur when the voting rights allocated to an investor do not correspond to its share of the capital in a company. Another type of limitation on the shareholder’s right to influence decision-making are the restrictions on the *investors’ powers to designate the members of the board of directors or managers*. Limitations on the *transfer or dealing in shares* may also allow companies to actively manage or control their equity. These main types of corporate practices are generally based on company laws and laws relating to the acquisition of companies. They may be included into the articles of association or into the company’s by-law to discourage or prevent hostile take-overs. Major corporate practices were identified in a recent study and are summarised in annex 1 to this Note.

3. Most of these corporate practices are not discriminatory against foreign investment even though they could, in practice, be more constraining on foreign investors than on domestic investors. However, in some countries companies have the right to include discriminatory provisions against foreign investors and their investments into their statutes. These can take the form of limitations regarding their participation in equity, discriminatory allocation of voting rights, and impediments to their exercise of directorships.

A. Existing disciplines

4. Existing international disciplines on corporate practices are limited. The only binding disciplines are to be found in the EU where community law prohibits the inclusion of discriminatory clauses in statutes or by-laws of companies incorporated in a member state of the EU.

5. Neither the OECD Codes nor the National Treatment Instrument contain any specific obligations on corporate practices. These instruments, however, allow a Member to refer to the Organisation when it considers its interests are prejudiced by measures and practices in other Member countries. Corporate practices have become one of the subjects covered by the OECD FDI country policy reviews.

B. The MAI

6. The preparatory work on the MAI suggested that it might be rather difficult to develop binding multilateral disciplines on corporate practices, particularly in the case of non-discriminatory corporate practices. There are considerable difficulties of definition and feasibility which require a thorough analysis before conclusions on comprehensive disciplines in this field can be drawn. However, consideration may be given to including, in the MAI, disciplines on corporate practices that distort foreign

investment decisions. In particular *discriminatory* practices allowed under national legislation or government regulation could be addressed. The MAI could state that national treatment and MFN/Non-discrimination obligations apply to provisions in companies articles of association and by-laws.

7. With respect to *non-discriminatory* corporate practices, the MAI could rely on the methods used in existing OECD instruments, notably the identification of corporate practices having a negative impact on FDI in the context of country examinations and reliance on the consultation mechanisms available in the OECD instruments.

Questions:

a) Should the the MAI address discriminatory provisions in company statutes and by-laws? If so, could this involve a specific provision in the MAI which would require that governments prohibit such provisions?

b) Should any other types of discriminatory practices be subject to national treatment and MFN/Non-discrimination obligations?

c) Should the MAI promote transparency of non-discriminatory corporate practices which may be of particular concern to foreign investment, for example by way of country examinations, horizontal studies and the consultative mechanism of the MAI?

ANNEX1

MAIN CATEGORIES OF CORPORATE PRACTICES IDENTIFIED BY THE CIME/CMIT [DAFFE/IME(93)11/REV2]

I. Derogations from the proportionality principle may allow enterprises to:

- issue shares intended for foreign investors carrying with them lesser voting rights than shares held by domestic investors,
- issue shares with plural voting rights,
- issue preferential shares without voting rights (non-voting shares),
- grant voting rights by ranges of shares held,
- grant "digressive" voting rights (i.e. shareholders have proportionately less rights than other shareholders with fewer shares of the same category),
- issue of "golden share" conferring on the holder, generally the state, the right to shape various provisions of privatised companies' articles of association for a limited, or indefinite, period.

II. Other practices limiting the shareholders' right to influence the decision-making process:

- discriminatory nationality-based limits on the exercise of a manager's or director's role on the board of directors,
- non-discriminatory limits on the exercise of a manager's or director's role on the board of directors,
- a requirement that a shareholder must possess a certain minimum number of shares to take part in shareholders' meetings,
- management system (i.e., a single manager or collegiate system),
- power structure (informal meetings, concentration of power within the national establishment),
- employees' role,
- rules on proxy voting at shareholders' meetings by (small) shareholders not attending,
- election procedures for directors,
- exercise of a director's role (rights, obligations, safeguards and term of office).

III. Practices granting the enterprise equity control:

- limits on the voting rights or equity ownership of any one shareholder (in his own right or as an agent),
- restrictions on the free negotiability of equity, for instance through approval clauses or pre-emption or redemption rights,
- arrangements whereby companies control their share capital by subscribing a capital increase or buying their own shares (particularly during a take-over attempt),
- reciprocal holdings (cross- or triangular holdings, "stable shareholder groups", etc.) to consolidate the body of shareholders),
- differing legislation on how take-overs may be launched or carried through (notifications to be published of the acquisition or transfer of large blocks of shares, criteria for take-overs, extent of purchase obligations).