



Negotiating Group on the Multilateral Agreement on Investment (MAI)

SELECTED ISSUES ARISING FROM EXPERT GROUP NO.3 ON SPECIAL TOPICS

(Note by the Chairman)

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1. The Expert Group N°3 on Special Topics has submitted a second report [DAFFE/MAI/EG3(96)22] to the Negotiating Group outlining proposals, including proposals for text, on the following six special topics: Key personnel, performance requirements, privatisation, monopolies/state enterprises, investment incentives, and corporate practices. While square brackets remain and views differ on the nature and format of certain provisions, work has advanced sufficiently at a technical level to seek specific guidance from the Negotiating Group on a number of issues in the Expert Group with a view to moving the negotiations forward.
2. The present document outlines selected EG3 issues for consideration by the Negotiating Group at the 18-20 December 1996 meeting. Each subject is introduced by a succinct description of the policy considerations before the Negotiating Group, followed by suggested points for discussion.

I KEY PERSONNEL

Relation to national immigration and labour laws (Section I of the EG3 Report, chapeau and related commentary)

3. There is a difference of view on the extent to which the MAI provisions on key personnel should prevail in the event of conflict with national immigration and labour laws. Some delegations consider that the MAI should prevail for all provisions on temporary entry and stay of investors and key personnel (Option A). Others believe that the MAI provisions should prevail only with respect to national labour market or economic needs tests and numerical restrictions (Option B). Under both options, the MAI would allow the host country to refuse temporary entry and stay for reasons of public health, public safety, criminal law or national security.

- *Would delegations agree to adopt the chapeau clause for key personnel as drafted and delete the square brackets, thereby adopting option B above, subject to the provision that immigration and labour laws shall not be invoked as means of evading obligations under the MAI?*

Work authorisation for spouses of key personnel [Section A of the EG3 Report, paragraph 4(b)]

4. The Expert Group agreed that the MAI should provide for the temporary entry and stay of spouse and minor children of key personnel. Views differ on whether the Article should, in addition, grant work authorisations to spouses.

- *Could delegations accept a best efforts commitment concerning the granting of work permits to spouses under this Article?*

II. PERFORMANCE REQUIREMENTS

Coverage of services (section II of the EG3 report, paragraphs 1 and 3)

5. There is broad agreement that the MAI should be more ambitious than the TRIMs Agreement in its coverage of performance requirements, whether or not linked with an advantage. This would argue in favour of the inclusion of services in paragraphs 1 and 3 of the article on performance requirements which would prohibit such requirements whether or not linked with an advantage. Some delegations have reserved their position so far.

- *Given that the MAI is intended to be a comprehensive agreement applying to all sectors, can delegations agree that services should be covered by the obligations of the MAI on performance requirements?*

III. PRIVATISATION

Special share arrangements (section III of the EG3 report, paragraph 3, and related commentary)

6. There is broad agreement that the National Treatment, MFN and Transparency obligations of the MAI would apply to both initial and subsequent sales associated with a privatisation operation. Views are divided, however, as to the status of special share arrangements. Some delegations consider that they should be deemed to be compatible with the MAI unless they explicitly or intentionally favour national investors or discriminate against foreign investors because of their nationality. Others consider that these arrangements hold strong potential for discrimination and are, in fact, inconsistent with National Treatment and MFN in many instances.

- *Special share arrangements that explicitly discriminate should be regarded as non-conforming measures and would need to be covered by country-specific reservations. Other arrangements could be subject to consultations if a Contracting Party considers it is negatively affected by special arrangements taken by another Contracting Party. Can delegations agree with such an approach?*

IV. MONOPOLIES

Anticompetitive practices of monopolies in a non-monopolised market (section IV of the EG3 report, paragraph 3(d) of Article A, and related commentary)

7. Some delegations consider that it would be important to cover this subject because monopolies have the capacity to introduce market distortions detrimental to foreign investors and their investments. Other delegations are of the view that requiring monopolies not to use their monopoly position to engage, directly or indirectly, in anticompetitive practices would constitute an undue intrusion into competition policy.

- *Should the MAI address matters of competition policy such as the issue of anticompetitive practices of monopolies in a non-monopolised market ? Should this issue be discussed now or could it be part of a built-in agenda for future discussion ?*

V. INVESTMENT INCENTIVES

“Positive discrimination” (section V of the EG3 report)

8. There is broad agreement that the MAI obligations on National Treatment, MFN and Transparency should apply to Investment Incentives (taking into account the advice of EG2 on the treatment of tax measures under the MAI). This would not prevent, however, a Contracting Party to accord *more favourable treatment* to foreign investors than to domestic investors in the allocation of investment incentives.

- *Do delegations agree that National Treatment and MFN apply to investment incentives ? Do they further agree that specific issues concerning investment incentives, such as positive discrimination of foreign investors, should be part of a built-in agenda for future discussion ?*

VI. CORPORATE PRACTICES

Non-government imposed corporate practices (section VI of the EG3 report, paragraph 3, and related commentary)

9. The general view is that government-imposed discriminatory corporate practices would fall within the purview of the Agreement. There is also support for including some form of discipline in the MAI provisions on non-government imposed discriminatory corporate practices found in the statutes, articles of association and by-laws of corporations since these measures too can constitute important constraints on foreign investors and their investments. Some delegations feel, however, that the MAI should not contain disciplines on corporate practices of small companies, especially family companies.

- *Should the MAI contain disciplines on non-government imposed discriminatory corporate practices of corporations listed in security exchanges?*