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Negotiating Group on the Multilateral Agreement on Investment (MAI)

Drafting Group No.2 on Selected Topics Concerning Treatment of Investors and Investment (Pre/Post Establishment)

REVISED ARTICLES ON SELECTED TOPICS CONCERNING THE TREATMENT OF INVESTORS AND INVESTMENTS (PRE/POST ESTABLISHMENT)

(Note by the Chairman)

This document was issued during the MAI negotiations which took place between 1995 and 1998.
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REVISED ARTICLES ON SELECTED TOPICS CONCERNING THE TREATMENT OF INVESTORS AND INVESTMENTS (PRE/POST ESTABLISHMENT)

A. Treatment of Investors/Investments

1. *Each Contracting Party shall accord to investors of another Contracting Party and to their investments treatment no less favourable than the treatment it accords [in like circumstances] to its own investors and their investments, [including treatment] with respect to the establishment, acquisition, expansion, management, [conduct,] operation, maintenance, use, enjoyment and disposal of investments*.

2. *Each Contracting Party shall accord to investors of another Contracting Party and to their investments treatment no less favourable than the treatment it accords [in like circumstances] to investors of any other Contracting Party or of a non-Contracting Party, and to the investments of investors of any other Contracting Party or of a non-Contracting Party, [including treatment] with respect to the establishment, acquisition, expansion, management, [conduct,] operation, maintenance, use, enjoyment and disposal of investments.*

3. *Each Contracting Party shall accord to investors of another Contracting Party and to their investments the better of the treatment required by paragraphs 1 and 2 whichever is the most favourable to those investors or investments*.

B. Transparency

1. Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations,[established policies,] procedures, administrative rulings and judicial decisions of general application as well as international agreements (hereinafter "measures") which may affect investors or investments.

2. Each Contracting Party shall establish one or more enquiry points to provide, upon request, specific information to other Contracting Parties [or to investors or their representatives] on matters subject to paragraph 1.

3. [Each Contracting Party shall notify the ("Parties Group") promptly, and in any case no later than 60 days after their adoption, any new measures or any changes to existing measures which significantly affect the implementation of its obligations under the Agreement.]

4. No Contracting Party shall be required to furnish or allow access to information concerning particular investors or investments the disclosure of which would impede law enforcement or would be contrary to its laws protecting the confidentiality of business information.

Comments

General

It was understood that the drafting of articles A and B was without prejudice to other aspects of the agreements, including definitions, reservations, exceptions, standstill and rollback.

Article A

1. Adding "in its territory" was considered for two purposes: *i)* to define the scope of application of national treatment and MFN; and *ii)* to provide an appropriate benchmark for national treatment and MFN. However, the first point may be dealt with by the Negotiating Group in the definitions section of the agreement, to make clear that Contracting Parties are not responsible for actions beyond their jurisdiction, including investments by investors of another Contracting Party in a third country. (One delegation reserves its position on paragraph 1 until the definition issue is settled.) On the second point, concern was expressed that adding the words "in its territory" might unduly limit the scope of the agreement, for example by excluding the international trade and investment activities of investments. One delegation suggested a third reason for including "in its territory" would be to underline the need to avoid conflicting requirements on multinational enterprises. This topic will need to be addressed separately by the Negotiating Group.

2. While some delegations would have preferred separate articles on pre- and post-establishment, it was agreed, as a starting point, to work on the basis of a single text. A single text would better capture the intended scope of the agreement and avoid the difficult task of defining the boundary between pre- and post establishment. The scope of the commitments by individual countries could be identified by using precise language in the reservations to National Treatment/MFN and perhaps by including references to relevant laws or regulations. Diversification activities are covered by the references to "establishment, acquisition and expansion". Such activities, where undertaken by established foreign-controlled enterprises, might need to be covered by the General Treatment provisions (see Article A of the draft articles on selected topics of Investment Protection[DAFFE/MAI/DG1(95)3]).

3. Some delegations proposed the "same" or "comparable" treatment as the appropriate standard rather than "no less favourable" treatment. The purpose would be to prevent unlimited competition for international investment funds with consequential costs and distortions to investment flows. However, most delegations considered that this would unacceptably weaken the standard of treatment from the investor's viewpoint. The question of investment "incentives" will be taken up later by the Negotiating Group.

4. Different views were expressed on the value of a "closed" or "open" list of the elements of investment to be covered by the National Treatment and MFN provisions, before and/or after establishment. A closed list had the advantage of certainty, but risked omitting elements that could be important to the investor, including elements for which different terms were used in different agreements (e.g. "disposal" instead of "sale and disposition"). The term "conduct" includes advertising. If included, it may also need to be covered by the General Treatment provision (Article A of the draft articles on selected topics of Investment Protection [DAFFE/MAI/DG1(95)3]).

5. National and MFN treatment are comparative terms. Some delegations believed that the context for comparison is implicit in the terms national treatment and MFN treatment, and considered that the words "in like circumstances" were unnecessary and open to abuse. Other delegations believed that the context for comparison should be made explicit, and thus sought inclusion of the phrase "in like

circumstances". Examples of an explicit reference are found in the NTI, some BITs and NAFTA. Examples of no explicit reference are found in some BITs and the ECT (although the United States and Canada made a Declaration concerning the term "in like circumstances"). Delegates agreed that measures aimed specifically at investors because they are foreign without legitimate policy reasons would, of course, be contrary to national treatment.

6. The question was asked whether the treatment accorded to foreign investors by a sub-federal state or province would meet the national treatment test only if it were no less favourable than the treatment accorded to the investors of the <u>same</u> state or province, or whether it would be sufficient to accord treatment no less favourable than that accorded to the investors from <u>any</u> other state or province. The question will need to be answered by the Negotiating Group in due course.

7. One delegation made a written proposal (attached) to refer, in the treatment of investors/investments article, to the concept of "equivalent competitive conditions" as in GATS (Article XVII). This proposal was considered to require more analysis. The same delegation suggested the addition of a distinct provision on "market access", modelled on the GATS (Article XVI), to deal with situations where the same restrictions apply to both domestic and foreign investors. Such measures may include both quantitative restrictions (e.g. economic need tests or numerical quotas) and qualitative measures (e.g. restrictions on the legal form of the activities permitted in a given sector). It was considered that this subject raised issues outside the traditional domain of National Treatment and MFN and required prior discussion in the Negotiating Group.

<u>Article B</u>

1. Public dissemination of measures affecting foreign investment was considered essential to the operation of the MAI. Nevertheless a balance should be struck between this objective and the administrative burden of implementing it.

2. Some delegations consider that "established policies" should be listed because the executive branch of governments may have the authority to enunciate policies on the treatment of foreign investors and their investments. Most delegations hesitated because the legal standing and recourse to "policies" varied among Member countries. In any case, only "established policies" should be subject to transparency obligations and only for governments which use this approach.

3. It might be necessary to review the term "measures" should it be used elsewhere in the agreement and possibly clarify the matter in the "definitions" section of the agreement.

4. It was agreed that the notification obligations in Paragraph 3 should be limited to the adoption of new measures or changes in existing measures where they relate to the obligations of a Contracting Party under the agreement. Separate notification of this information to each Contracting Party did not appear necessary since it would be available to the Contracting Parties Group. Implementation of the notification obligations will need to be taken up in a later discussion on the functions of the Contracting Parties Group.

5. The administrative burden and risk of formal dispute settlement procedures applying to the activities of enquiry points made some delegations reluctant to extend their obligations to enquiries from investors. If the reference to "investors or their representatives" were dropped, it would still be possible for investors, in case of difficulty, to obtain the information needed if their own governments were willing to use the enquiry points on their behalf.

6. The information subject to the notification obligation to the “Parties Group” under paragraph 3 is narrower than the information to be made available under paragraphs 1 and 2. The notification obligation of paragraph 3 would apply, in particular, to non-conforming measures (whether or not covered by country specific reservations), or measures subject to general exceptions or temporary derogations. Cross-references to this article could be made in the provisions concerning non-conforming measures, general exceptions or temporary derogations. Such a cross reference is made in the draft article on general exceptions presented in document DAFFE/MAI/DG2(95)2.

7. Another suggestion was that any Contracting Party should be entitled to notify to the Contracting Parties Group any measure taken by any other Contracting Party which it considers affects the operation of the agreement. This too should be considered in the context of the functions of the Parties Group.

8. Paragraph 4 addresses the concerns that may arise with respect to the disclosure of information in the context of law enforcement or laws protecting the confidentiality of information. Such concerns are addressed in other international agreements (GATS, Energy Charter, NAFTA). It was felt unnecessary, however, to add a reference to the protection of national security since this issue would be addressed in the general exception article [see Paragraph 2.b of the draft in DAFFE/MAI/DG2(95)2].