



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. 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 and obligatory, notably in the companies' articles of association and/or by-laws, or they may result from the day-to-day activities of enterprises. They can discriminate against foreign investors or apply to particular categories of investors, including nationals.

2. The Expert Group shared the view, however, that the fundamental vocation of the MAI is to discipline discriminatory actions by governmental authorities. Discriminatory corporate practices imposed by domestic laws, regulations, administrative practices and policies¹ **or any other government action** should, however, be made subject to MAI obligations.

II. National Treatment and Most Favoured Nation Treatment

3. The Expert Group considered that the National Treatment and Most Favoured Nation Treatment (MFN) obligations would apply to government **measures** which explicitly require that locally-incorporated companies (or to-be-locally incorporated companies) impose or administer, **on a company-by-company basis**, restrictions against foreign investors, be it in their statutes, by-laws or day-to-day operations. **For example, government imposed** corporate restrictions on foreign investors' participation in the equity or capital base of an established enterprise or on the resale of its shares to foreign investors shall be considered as having the same status as direct governmental restrictions.

4. **Government imposed** corporate practices in company statutes or by-laws limiting the participation of non-nationals on boards of directors and in management should also be considered contrary to **the MAI** if direct government measures of the same nature and effect were also to be made subject to **its** obligations².

5. Both types of **government imposed** corporate practices **could** be covered by country specific reservations in accordance with the procedures that have been proposed to the Negotiating Group [DAFFE/MAI/96(16), section C]. **One delegation noted that article 1107 of the NAFTA reproduced**

1 **The coverage of administrative practices and policies is under consideration by Drafting Group No. 3.**

2 This matter is also discussed under the subject of key personnel.

in Annex 2 might be a useful provision in setting out what is and is not acceptable from the perspective of limits and country-specific reservations concerning management.

6. Most delegations considered, however, that these obligations should not extend to corporate practices that are **not contrary** under the Contracting Parties' laws, regulations and policies even where these practices could result in discriminatory equity restrictions or limitations in participation on boards of directors and in the management of a company. To prohibit such practices would interfere with the **right of an enterprise to freely contract**. There would be practical difficulties in creating obligations in this area since governments do not normally compile detailed information on these practices. These practices may vary from firm to firm. **It was much less clear whether the MAI could or should capture discriminatory corporate practices that are explicitly permitted, but not required, under the Contracting Parties' laws, regulations, and policies.**

7. A few delegations argued that the MAI should not totally discard the possibility of disciplining in some way discriminatory corporate practices in company statutes and by-laws. An outright prohibition at the corporate level would be the most effective means of addressing the problem, but would also be the most difficult to implement. Further thought should be given to the merits of including a best endeavour clause into the MAI that would encourage Contracting Parties to legislate or regulate in favour of the removal of **discriminatory elements** in company statutes and by-laws or to avoid encouraging (**or inviting**) enterprises (**not**) to adopt discriminatory provisions. **One delegation indicated that it could not contemplate a provision that would encourage Contracting Parties to undertake legislative or regulatory action in this area.**

8. These experts also felt the MAI could not fall below the provisions developed in other agreements, and particularly those of Article IX of the GATS. An MAI provision inspired from this article could recognise that certain corporate practices may negatively affect foreign investors and their investments. It could also provide for consultation procedures aimed at addressing problems that may arise from the existence of corporate practices in a Contracting Party.

III. Transparency

9. A majority of delegations considered that, under the clarification of the scope of application of the National Treatment and MFN obligations in paragraphs 3-4 above, the draft transparency article proposed in section II.2 of DAF/MAI/96(16) would adequately capture laws and regulations requiring companies to impose restrictions on foreign investors and their investments inconsistent with these provisions³. There would, therefore, be no need for specific transparency rules for corporate practices in the MAI.

10. A few delegations felt, however, that these requirements would not capture all corporate practices of concern and that complementary avenues should be explored to enhance transparency of discriminatory measures found in company statutes and by-laws. The GATS Article IX approach would encourage Contracting Parties to supply publicly available non-confidential information to Contracting Parties with concerns about particular corporate practices. This information could also be made available under the dispute settlement mechanism of the MAI and more particularly, under the consultation

³ Contracting Parties would be obliged to " promptly publish, or otherwise make publicly available, its laws, regulations, procedures and policies ... which may affect the operation of the Agreement". They would also be obliged to promptly respond to specific questions and provide, upon request, information to other Contracting Parties on matters raised by corporate practices.

procedures envisaged by Expert Group No. 1 [DAFFE/MAI/EG3(96)5]. Another possibility might be the compilation of company statutes **and by-laws** in a centralised register. Since company statutes are usually public documents, they could be made accessible to the Contracting Parties and their investors. **By-laws, however, are not usually public documents. One delegation argued that some symmetry and clarification of laws and practices amongst Contracting Parties would have to be found before contemplating transparency obligations for restrictions formulated in by-laws. Another delegation did not consider it necessary to establish specific transparency or consultation procedures regarding corporate practices.**

11. The Expert Group concluded that further consideration should be given to the issue of how the techniques developed under existing OECD instruments to bring greater transparency on corporate practices could be taken up under the MAI. Extensive interest was expressed, **in particular**, in including the subject of corporate practices in future MAI "peers" country reviews by the Parties Group.

Annex 1

Article IX of the GATS

Business Practices

1. Members recognise that certain business practices of service suppliers, other than those falling under Article VIII⁴, may restrain competition and thereby trade in services.
2. Each Member shall, at the request of any other Member, enter into consultation with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and sympathetic consideration to such a request and shall co-operate through the supply of publicly available non-confidential information of relevance to the matter in question. The Member addressed shall also provide other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member.

4 This article pertains to *Monopolies and Exclusive Services Suppliers*.

Annex 2

NAFTA

Article 1107: Senior Management and Boards of Directors

- 1. No Party may require that an enterprise of that Party that is an investment of an investor of another Party appoint to senior management positions individuals of any particular nationality.**

- 2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is an investment of an investor of another Party, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.**