



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Expert Group No.3 on “Special Topics”

ADDITIONAL NOTE TO THE NEGOTIATING GROUP

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After the presentation of the results of the work of Expert Group N°3 to the Negotiating Group on 29 January 1997, the experts were invited to pursue their discussions informally in parallel to the Negotiating Group's meeting. The present Note summarises the outcome of the discussions held on 30 January 1997 which focused on three subjects: Performance Requirements, Privatisation and Concessions.

I. Performance requirements

The Expert Group reviewed paragraphs 3-6 of the proposed draft article on Performance Requirements. Its comments are recorded in the footnotes added to these paragraphs. They include specific questions that delegations agreed to consider further in their capitals with a view to finding possible solutions to outstanding questions.

Proposed Text

(Note: Brackets and footnotes from the existing draft text are meant to be preserved¹, although footnotes are not set forth in this re-organised draft.)

1. [No Contracting Party [may] [shall]] [**A Contracting Party shall not**], in connection with the establishment, acquisition, expansion, management, operation or conduct of an investment **in its territory** of an investor of a Contracting Party or of a non-Contracting Party ~~in its territory~~, impose, enforce or maintain any of the following requirements, or enforce any commitment or undertaking:

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales to the volume or value of its exports or foreign exchange earnings;

1. *With respect to footnote 23 in section III of the Consolidated Texts and Commentary [DAFFE/MAI(97)1], one delegation noted that it has no reservation on Article 1(a) of performance requirements.*

- (f) to transfer technology, a production process or other proprietary knowledge to a natural or legal person in its territory[, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement];
- (g) to locate its headquarters for a specific region or the world market in **the territory of** that Contracting Party;
- (h) to supply one or more of the goods that it produces or the services that it provides to a specific region or **the** world market exclusively from the territory of that Contracting Party;
- [(i) to achieve a given level or value of production, investment, manufacturing, sales, employment, or research and development in its territory;]
- [(j) to hire a given level or type of local personnel;]
- (k) to establish a joint venture; or
- [(l) to achieve a minimum level of local equity participation.]

2. **Alternative A:** A Contracting Party is precluded by paragraph 1 from conditioning the receipt or continued receipt of an advantage, in connection with an investment² **in its territory** of a Contracting Party or of a non- Contracting Party ~~in its territory~~, on **compliance with** any of the requirements[, **commitments or undertakings**] set forth in paragraphs* [1(a)] [1(b)] through 1(e), but is not precluded by paragraph 1 from doing so regarding any of the requirements[, **commitments or undertakings**] set forth in paragraphs* [1(a) and] 1(f) through 1(l).

2. **Alternative B:** A Contracting Party is not precluded by paragraph 1 from conditioning the receipt or continued receipt of an advantage, **in connection with an investment in its territory of a Contracting Party or of a non- Contracting Party**, on compliance with any of the requirements [, **commitments or undertakings**] set forth in paragraphs* [1(a) and] 1(f) through 1(l).

3. Nothing in paragraphs* [1(a),] 1(b), 1(c), 1(d), and 1(e) shall be construed to prevent a Contracting Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Contracting Party or of a non-Contracting Party, on compliance with a requirement[, **commitment or undertaking**] [to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development,] in its territory.³

2. Paragraph 3, Alternative 2, of the consolidated text used the phrase “in connection with the establishment, acquisition, expansion, management, or operation or conduct of an investment” rather than “in connection with an investment” (which was used in Paragraph 3, Alternative 1, of the consolidated text and is used here). Delegations may wish to reflect further regarding which phrasing is preferable.

3. *While it was recognised that there could be legitimate reasons for the government programmes listed in the bracket, delegations were invited to review each of these bracketed items in order to determine the appropriateness of retaining them in the article.*

4. [A measure that requires an investment to use a technology to meet generally applicable health, safety, or environmental requirements shall not, on the basis of such requirement, be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles XXX on National Treatment and MFN apply to the measure.]⁴

5. [Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on ~~international trade~~ or investment, nothing in paragraphs 1(b) and 1(c) shall be construed to prevent any Contracting Party from adopting or maintaining measures, including environmental measures:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement:

(b) necessary to protect human, animal or plant life or health;

(c) necessary for the conservation of living or non-living exhaustible natural resources.]⁴

[6. ~~The provision of:~~

(a) Paragraphs 1(a), 1(b), and 1(c) do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programmes;

(b) paragraphs 1(b), 1(c), 1(f), and 1(h) do not apply to procurement by a Contracting Party or a state enterprise; and

4. *All but three delegations supported deletion of these two articles. Strong doubts were expressed that they would be necessary. It was also unclear what where the concerns in relation to the performance requirement prohibitions. In addition, it was noted that the subjects seem to raise more general concerns, which could more appropriately be addressed in the context of a more general provision in the MAI.*

Concerning the environment requirements mentioned in Article 4, one delegation explained that this reference was necessary to ensure consistency with international obligations under the Montreal Protocol on Substances that Deplete the Ozone Layer and offered to provide a written explanation of the rationale for this provision. Written explanations should also be provided with respect to the contents of paragraph 5. The question was also raised as to whether there might be other international obligations in this field that might call for this provision.

- (c) paragraphs 1(b) and 1(c) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.]
- [(d) paragraph 1(i) does not apply to requirements imposed by a Contracting Party as a part of privatisation operations.]^{5 6}
- * **Delegations are considering which paragraphs are appropriately referenced at particular points.**

II. Privatisation

The experts agreed to work on the basis of the second alternative in the new draft definition proposed by the co-ordinator which reads as follows:

Paragraph 5 (Definition)

“Privatisation means the sale or other disposal, in part or in full, of

[assets]

(or)

[equity interests of a Contracting Party in a [state] enterprise or government entity, or the sale or other disposal of [the] assets of a state enterprise or government entity].

There was consensus that privatisation should include the sale or other disposal of equity interest in a **state enterprise**, *i.e.*, a publicly-owned or controlled enterprise, including the assets that might have to be transferred from the initial to the new owner as part of such an operation. It was also recognised that the language might need to be improved to clarify whether a sale of a minority stake in an enterprise previously under state control is also to be covered.

Views were divided, however, as to whether the sale of assets **not part** of the partial or complete sale of a state enterprise, notably real estate owned directly by the State, should be included in the definition. While it was recognised that problems with such coverage could be dealt with through country-specific reservations, this matter deserves further scrutiny before deciding which way to go.

It was confirmed nevertheless that the sale of assets by the state enterprises themselves did not belong to the concept of privatisation.

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5. *A number of questions were raised with respect to the proposed clarifications (a)-(d). It was noted that there could be links between subparagraph (a) and the WTO TRIMS Agreement. Delegations were invited to check with foreign aid, government procurement and trade experts in their capitals to ascertain the rationale for an eventual inclusion of these provisions into the performance requirements article.*
6. *One delegation maintains its reservation in footnote 2 of section II of DAF/MAI/EG3(96)22 on the retroactive application of the Article to performance Requirements agreed in the context of privatisation operations.*

It was also underlined that the National Treatment and Most Favoured Nation obligations (unless otherwise stated) would apply to all relevant government measures. The definition of privatisation would only determine which measures would fall under the specific disciplines of the privatisation article, such as the suggested additional transparency requirements.

III. Concessions

As it was stated in paragraph 12 of DAFPE/MAI/EG3(97)3, there is general recognition that concessions is a form of assets and should therefore be included in the definition of "investment" of the MAI. Three options were identified :

- a) the definition proposed by one delegation (DAFFE/MAI/EG3/RD(97)1);
- b) substitution of the word "is" by "includes" in the delegation's proposal to ensure, *inter alia*, that the field of natural resources will be covered as well by this definition; or
- c) no special definition since concessions would in any case be captured by items iv) and vii) of the proposed MAI definition of "investment".

Delegations were invited to examine further the merits of these three options and to reflect in particular, on the dividing line between concessions and monopolies and the extent to which contracts could be assimilated to services contracts.

With regard to the transparency, some delegations saw no merit in the delegation's proposal [DAFFE/MAI/EG3/RD(97)1] and questioned whether it would be appropriate to include rules of this kind in an investment agreement. Questions were also raised regarding the relationship between the suggested rules and the provisions found in the WTO Government Procurement Agreement. Other delegations expressed interest in this proposal and wanted to examine it in more detail. Delegations were thus invited to reflect further on the proposal.