



Negotiating Group on the Multilateral Agreement on Investment (MAI)

SELECTED ISSUES ARISING FROM DRAFTING GROUP No.3

(Note by the Chairman)

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1. The first report by Drafting Group No. 3 [DAFFE/MAI/DG3(96)1, 1 October 1996] submitted several issues to the Negotiating Group for policy discussions. For most issues, the Drafting Group identified options for texts representing the policy choices.

2. This note by the Chairman focuses on four of those issues which, in his view, are ripe for discussion. It puts forwards proposed solutions based on the options identified by the Drafting Group.

A. Indirect investment and denial of benefits

3. Drafting Group 3 considered four cases of indirect investment:

- (a) Investment by an investor established in another MAI Party, but owned or controlled by a non-MAI investor;
- (b) Investment by an investor established in a non-MAI Party, but owned or controlled by a MAI Party investor;
- (c) Investment by an investor established in another MAI Party, but owned or controlled by an investor of a third MAI Party;
- (d) Investment in a MAI Party by an investment there covered by the MAI.

4. There was consensus that cases (c) and (d) should be covered by the MAI. There was also a broadly shared view that case (a) should be covered provided that a denial of benefits clause would permit exclusion where the MAI investor lacked substantial business activity in the MAI Party.

5. Views differ on whether the MAI should cover case (b). Some delegations hesitate to cover case (b) because of the potential free-rider problem. Other delegations are in favour of providing maximum coverage of MAI investors and their investments and think that a denial of benefits clause that could be invoked for case (a) would also resolve the free rider concerns with respect to case (b).

Could delegations agree to accept a limited extension of MAI benefits to non-MAI parties which could arise by including case (b), in the interests of providing maximum coverage and protection to all MAI investors?

B. Losses from currency fluctuations

6. Drafting Group 3 identified four options dealing with the question of protecting the investor against losses from currency fluctuations before the date of payment of compensation:

- (a) Giving the investor the choice of currency but primarily limiting that choice to the currencies of the home or host government.
- (b) Giving the host government the choice of currency among a freely usable currency, or the ECU, or any other currency acceptable to the investor.
- (c) Giving the host government the choice of currency among freely convertible currencies, as defined in the MAI.
- (d) No explicit provision.

7. Most delegations believe that a specific provision on this issue is not necessary. Others feel strongly that this approach might leave the issue open for dispute settlement. Many delegations consider that option (c) could present an acceptable compromise, provided that there is an agreement on how to define the term "freely convertible currency"¹.

Could delegations accept option (c) provided that agreement is reached on how to define a freely convertible currency or do delegations prefer option (d)?

C. Transfers

Paragraph 4.6

8. There is agreement that the MAI Contracting Parties have the right to apply measures aimed, inter-alia, at protecting creditors, ensuring compliance with national laws and regulations, and ensuring the satisfaction of judgements in civil, administrative and criminal proceedings. There is no agreement so far whether this right should be mentioned explicitly.

Could delegates accept a provision along the lines of the proposed Article 4.6, which would include an anti-abuse clause?

D. Controls and Formalities

9. The Drafting Group agreed on a text (Article 2.3) dealing with the freedom of a Contracting Party to require routine information concerning an investment solely for information or statistical purposes. One delegation has made the following additional proposals:

¹ The definition here would be the same as that for the "Transfers" provision (article 4.2)

- (a) the addition of a sentence to Article 2.3 as follows: Nothing in this paragraph shall be construed to prevent a Contracting Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its laws.
- (b) the addition of a paragraph which would allow residency requirements as part of special formalities in connection with the establishment of investments.

10. Most delegations can accept the sentence proposed in paragraph (a), but have serious concerns as to the substantive implications of paragraph (b), in particular the residency requirements contained therein.

Do delegates agree to add a sentence to Article 2.3 as contained in paragraph (a), above and that it is not necessary to include an additional paragraph on special formalities?