



Negotiating Group on the Multilateral Agreement on Investment (MAI)

SELECTED ISSUES ON SPECIAL TOPICS

(Note by the Chairman)

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I. Key Personnel

Anti-abuse clause

1. An anti-abuse clause was included in brackets in the report on key personnel submitted to the NG at the February meeting.

2. Opinions are divided whether an anti-abuse clause (and its precise formulation) should be included in this Article, particularly given the nature of the obligations regarding key personnel.

-- *Would delegations accept that we delete the anti-abuse clause and include a footnote which indicates that the issue of such a clause, its precise wording, as well as its placement, is still to be decided?*

One year prior employment requirement

3. A one year prior employment requirement in brackets was included in the report on key personnel submitted at the last NG meeting in February. This would limit the employees that could benefit from the MAI to those that have a one year prior employment relationship with the enterprise.

-- *Could delegations accept to delete the one-year employment requirement on the understanding that the chapeau would permit them to continue to apply any national requirements with respect to entry and stay?*

Natural person of another Contracting Party

4. The definition of natural person of another Contracting Party was included in brackets in the report on key personnel that was submitted to the NG meeting in February. The inclusion of permanent residents in this definition was also in brackets.

5. Several delegations were concerned with extending the benefits of the MAI key personnel provision to permanent residents of another Contracting Party. The issue arises in respect of (i) investor and of (ii) the other categories of natural persons covered by the agreement.

-- *Could delegations accept to delete the brackets around the definition of natural person of another Contracting Party and delete the brackets around permanent resident in conformity with the Chairman's text on definition of investor?*

II. Performance Requirements

6. Paragraph 1 of the draft article contains a list of prohibited performance requirements.

- *Do delegations agree that the requirement to establish a joint venture (subparagraph K) or to achieve a minimum level of equity participation (subparagraph L) should be included in the list of prohibited performance requirements?*
- *Would it be helpful in this regard to add an Interpretative Note stating that, for greater certainty, the National Treatment and MFN Treatment provisions of the MAI also apply to these cases and indeed to all the performance requirements listed in paragraph 1?*

7. Another outstanding issue concerns whether, and if so how, the performance requirements prohibitions should be qualified to allow measures to be adopted or maintained when necessary to secure compliance with environmental and other laws and regulations that are not otherwise inconsistent with the MAI.

- *A compromise solution might be to adopt an Interpretative Note along these lines. Would this be acceptable?*

III. Privatisation

8. A range of proposals has been under consideration for dealing with so-called “special share arrangements” such as golden shares and core shareholdings.

- *Would delegations agree to an approach under which the MAI would consider such arrangements contrary to National Treatment and MFN obligations if they explicitly discriminate against foreign investors for their investments, or if they give rise to such discrimination de facto in their application?*
- *There seems to be agreement that countries should be free to lodge reservations to this provision. Would delegations agree that such reservations could be lodged on entry into force of the MAI on a precautionary basis and thus not subject to standstill? Or should it be permitted to lodge reservations in the future at the time particular privatisations take place?*

IV. Investment Incentives

9. In December the Chairman concluded that work should be continued on the assumption that National Treatment, MFN and transparency would apply to investment incentives and that it would be desirable but “not legally necessary” to record the application of these disciplines to investment incentives in a specific article of the MAI. Expert Group No.2 has since reported that, while some delegations felt that including tax incentives would add to the value of the proposed disciplines of the incentives article, the vast majority of the group did not see any reason for subjecting tax incentives to any disciplines different from those applying to tax measures in general which they proposed to carve-out from the MAI National Treatment and MFN provisions.

- *Do delegations agree to provide in the MAI for the possibility of consultations, either bilaterally or multilaterally in the Parties Group, in the event that a Contracting Party considers that its investments or its investors are adversely affected by an investment incentive adopted by another Contracting Party?*

- *Do delegations consider that further work on disciplines in this area, addressing the issue of possible discrimination and the need for additional transparency provision from a standstill or rollback, should be addressed in a built-in agenda?*