



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)**

**DISCUSSION OF DRAFT ARTICLES ON NATIONAL TREATMENT,
NON-DISCRIMINATION/MFN AND TRANSPARENCY**

(Note by the Chairman)

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I. INTRODUCTION

The Drafting Group has been charged with drafting specific provisions in the MAI on selected topics concerning the treatment of investors and investment (pre/post establishment). This document contains text for provisions on the first three subjects appearing on the Group's mandate, namely national treatment, non-discrimination/MFN and transparency, for the Group's consideration at its first meeting on 5-6 December 1995.

The proposals are based on the orientation discussion at the October meeting of the Negotiating Group and "state of the art" language in existing international investment instruments. They are accompanied by a commentary on the scope and application of the draft provisions.

II. DRAFT ARTICLES

A. Treatment of Investors/Investments

1. *Each Party shall accord to investors of another Party, and to their investments treatment no less favourable than that accorded [in like circumstances] to its own investors and their investments with respect to the establishment, acquisition, expansion, management, conduct, operation,[maintenance, use, enjoyment] and disposal of investments.*
2. *Each Party shall accord to investors of another Party, and to their investments, treatment no less favourable than that accorded [in like circumstances] to investors of any other Party or of a non-Party, and to the investments of investors of any other Party or of a non-Party, with respect to the establishment, acquisition, expansion, management, conduct, operation,[maintenance, use, enjoyment] and disposal of investments.*
3. *Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by paragraphs 1 and 2.*

B. Transparency

1. *Each Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures, administrative rulings of general application and judicial decisions (hereinafter "measures"), and any other relevant information which may affect the operation of the Agreement.*
2. *Each Party shall notify the [Parties Group] promptly and in any case no later than 60 days, of the introduction of any new measures or any changes to existing measures which affect the operation of the Agreement.*

3. *Each Party shall establish one or more enquiry points to provide specific information to other Parties, upon request, on matters subject to the requirements of paragraph 1 or paragraph 2.*

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

II. COMMENTARY

A. Treatment Of Investors/Investments

Paragraph 1: National Treatment

1. This formulation draws on the most commonly used language in existing investment agreements which defines national treatment as “treatment no less favourable” than that accorded to domestic investors. It is drafted in unconditional terms. It allows for both *de jure* (official texts) and *de facto* (in actual practice) national treatment. It covers both pre- and post-establishment, i.e. it could apply equally to non-established/non-resident investors and investors established under host country law.

2. The scope of application of this article would also depend on the definitions given by the MAI to the terms “investors” and “investments”. The level of detail provided (establishment, acquisition, expansion, management, conduct, operation, maintenance, use, enjoyment and disposal of investments) is intended to clarify the types of investment operations covered and minimise future problems of interpretation. It is for discussion whether the inclusion of the terms “maintenance, use and enjoyment “ in the national treatment provision offers additional protection to that provided by the General Treatment article in the Draft text on Investment Protection [DAFFE/MAI/DG1(95)2], or whether it detracts from this General Treatment. It would be necessary to ensure that this article is consistent with the article on investment protection.

3. A number of investment agreements define “less favourable treatment” in reference to the “like circumstances” encountered by investors and their investments. This means that national treatment applies with respect to similar situations, but that it does not apply, as a general rule, to different circumstances or situations. Under the GATS, where this expression is not used, the comparison is made between foreign “services and service suppliers” and domestic “like-services and service suppliers”. The terms “like circumstances”, “like situations” or “like investors or investments” may leave room for interpretation, however, and therefore may not be fully satisfactory. The question arises as to whether the MAI formulation should make reference to “like circumstances”.

4. A related question is whether a clarification or interpretative statement of some sort might prevent a diverted use of “like circumstances” if such a clause were included. There are a number of precedents, notably the clarification elaborated under the OECD National Treatment Instrument (NTI) and interpretative statements made by signatories of the Energy Charter Treaty (ECT) and NAFTA. There is also an understanding on “equivalent treatment” under the NTI for branches and other unincorporated entities of non-established foreign-controlled enterprises.

5. Under the *National Treatment Instrument*, “in like situations” means that the comparison between foreign-controlled established enterprises and domestic enterprises is valid only if it is made between firms operating in the same sector. General considerations, such as the policy objectives of a Member country, could also be taken into account. Another test is whether the discrimination is motivated, at least in part, by the fact that the enterprises concerned are under foreign control.

6. According to the *Canada/United States Declaration* on “in like circumstances” concerning Article 10 of the *Energy Charter Treaty*, two basic factors must be taken into account in determining whether differential treatment of investors or investments is consistent with the national treatment obligation. The first factor is whether the objectives are consistent with the principle of non-discrimination. It is recognised that legitimate policy objectives may justify differential treatment in order

to reflect a dissimilarity of circumstances encountered by foreign investors and their domestic counterparts. For example, the objective of ensuring the integrity of a country's financial system would justify reasonable prudential measures with respect to foreign investors or their investments, where such measures would be unnecessary to ensure the attainment of the same objectives insofar as domestic investors or investments are concerned. The second factor is the extent to which the measure is motivated by the fact that the investor or investment is subject to foreign ownership or is under foreign control. A measure aimed specifically at an investor because it is foreign, without sufficient countervailing policy reasons, would be contrary to national treatment obligation.

7. According to the *US Statement of Administrative Action* pertaining to the *Cross-Border Trade in Services Chapter of NAFTA*, the no "less favourable" provision does not require that investors from other Parties receive the same or even equal treatment as that provided to local companies or other foreign firms. Foreign investors and their investments may be treated differently if circumstances warrant it. For example, a Party may impose special requirements on investors of other Parties and their investments if necessary to protect consumers to the same degree as they are protected in respect of local firms. The non-discrimination/MFN obligation prohibits the imposition of laws and regulations designed to skew the terms of competition in favour of local firms but it does not bar legitimate regulatory distinctions between such firms and foreign firms and their investments.

8. The Group may also discuss whether "market access" concerns need to be addressed. These situations can arise, in particular, when the *same restrictions* are imposed on domestic and foreign investors and their investments. Apart from the cases of monopolies and state enterprises, which will be discussed separately in the Negotiating Group, there may be quotas on the number of investors or market needs tests, limitations on the value of the investments and/or assets of investors or their investments, limitations on the types of activities that might be undertaken, limitations on personnel employed by the investors and their enterprises. As the national treatment provision may not adequately address this issue, the question arises whether the MAI might contain special provisions on market access and if so what might be the nature and scope of these provisions.

Paragraph 2. Non-Discrimination/MFN

9. As with other investment agreements, the proposed formulation is closely similar to the language used in the national treatment obligation. This means that the solutions that might be found with respect to the issues identified in the previous section should also be relevant to non-discrimination/MFN provision.

10. The language proposed is designed to ensure that the benefits accorded by a Party to a non-Party (such as in the context of a bilateral, regional or international agreement) are also accorded to the MAI Parties.

11. The right of a Party to benefit from the undertakings of other Parties is implicit in the proposed formulation. The Group may nevertheless consider whether this should be made explicit as in the OECD Codes.

Paragraph 3. Standard Of Treatment

12. Most investment agreements explicitly provide for the better of national treatment or non-discrimination MFN. This follows from the fact that non-discrimination/MFN is considered to be an

absolute standard that should be provided even in the absence of national treatment. This could be spelled out in the non-discrimination/MFN article or through a separate article, as suggested above.

B. TRANSPARENCY

13. Most *transparency* provisions in existing investment agreements distinguish between the “publication or diffusion” of information of direct relevance for investors and investment decisions and the “notification” of measures and practices which may impair, modify or nullify the nature and level of commitments undertaken by the Parties. The latter requirement is, in fact, closely related to dispute settlement provisions which provide for consultation and conciliation and the resolution of disputes which may arise with regard to the notification of non-conforming measures. In addition, some agreements provide for contact points or enquiry points to facilitate the exchange of information with foreign investors. As a general rule, however, these provisions do not prevent a Party from protecting the confidentiality of business information.

14. It is recalled that Article 1c) of the NTI provides that the “Organisation shall consider the notifications submitted [to it] with a view to determining whether each member is meeting its commitments under the instrument”. This allows the Organisation to discuss the measures notified by Member countries. In addition, nothing precludes a member to refer to the Organisation for information on a Member country’s laws and regulations which may have a bearing on the NTI. These provisions may be taken into account in the context of the Negotiating Group’s discussion on the functions of the MAI Parties Group.