



Negotiating Group on the Multilateral Agreement on Investment (MAI)

**TREATMENT OF INVESTORS AND INVESTMENTS
(PRE/POST-ESTABLISHMENT)**

(Note by the Chairman)

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At its first meeting on 26-27 September 1995, the Negotiating Group decided to start its work with a general discussion of the main components of the Multilateral Investment Agreement (MAI) and identified a number of issues for consideration at its 24-26 October 1995 meeting. This Note presents a synoptic description of key elements of that have been identified as fundamental obligations for the Treatment of Investors and Investments, with a view to soliciting more precise views from negotiators on the nature and scope of MAI obligations in this area and determining the orientation of further work. This note draws on the preparatory work on the MAI¹. Selected extracts from relevant investment agreements are reproduced in document DAFFE/MAI/RD(95)7 for the convenience of negotiators.

¹ Ministerial Communiqué [C(95)118, Report to Ministers [DAFFE/INV/IME(95)13/Final, Revised Summary Reports by the Chairmen MAI Working Groups A-E [DAFFE/INV/IME/RD(95)4].

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As stated in the CIME/CMIT report to Ministers [DAFFE/INV/IME(95)13/Final] a major objective for the MAI is to establish high standards for the treatment of investors and investments, based on two corner-stone principles: national treatment and non-discrimination/MFN. It is understood that very limited departures from these principles should be allowed. The MAI should provide for the reduction or elimination of non-conforming measures. Any remaining non-conforming measures should be subject to transparency requirements.

a. National Treatment

National treatment is the obligation to treat foreign investors and/or their investments no less favourably than national investors in like situations. It is a relative standard which compares the treatment accorded to investors and/or investments from a foreign country with that accorded to investors/investments in a host country.

National treatment could apply to:

- a) the pre-establishment phase, i.e. the making of new investments, including the participation in existing enterprises, by foreign or non-resident investors;
- b) the post-establishment phase, i.e. the conditions of operation in the host country for enterprises owned or controlled by non-established or non-resident investors.

A related question is whether new investments in the territory of the host state, made by enterprises owned or controlled by foreign or non-resident investors, are to be seen as belonging to the pre- or the post establishment phase.

The national treatment obligation could apply to *de facto* as well as *de jure* discrimination and extend to measures and practices taken by bodies with delegated regulatory powers such as self-regulatory bodies.

Questions:

- *Could negotiators comment on the possible scope of the national treatment obligation drawing on the elements described above?*
- *Could they provide guidance for the drafting of a MAI provision in this area drawing, for instance, on formulations found in existing international investment instruments?*

b. Non-discrimination/MFN

Non-discrimination/MFN refers to the obligation of a host country to grant to all investors and/or investments from another country similar treatment irrespective of the country of origin. As a general rule, this principle is an absolute standard in international investment instruments since it applies even when national treatment is not provided by the parties.

The question arises whether departures from this principle should be allowed and if so under what circumstances and conditions.

It should also be noted that a number of international investment instruments (BITs and NAFTA) provide that parties must accord the better of national treatment and non-discrimination/MFN.

Questions:

- *Could negotiators comment on the possible scope of non-discrimination/ MFN obligation drawing on the elements described above?*

c. Standstill

Standstill means the imposition of the status quo on existing measures and practices which do not conform with liberalisation /treatment obligations. It excludes, in principle, the introduction of new restrictions, unless this is allowed by other provisions e.g., (temporary) derogations, or general exceptions on specific grounds (such as national security). It is an irreversible standard, setting a floor for liberalisation, and an essential component of a "top down" approach to liberalisation.

Questions:

- *Could the negotiators comment the possible scope of the standstill obligation and its implications for the liberalisation mechanism of the MAI drawing on the elements described above*
- *Should the standstill obligation be the subject of a separate article in the MAI or would it flow from other provisions of the agreement such as those relating to the listing of non-conforming measures?*

d. Rollback

Rollback is a process aimed at the reduction and eventual elimination of non-conforming measures. This could result from "peer pressure" exerted by the parties or from unilateral decisions by a party without any counterpart.

Rollback or reduction may be negotiated in connection with conclusion of the MAI, either taking effect upon accession or after accession, for instance according to a predetermined timetable, e.g., sunset clauses. It might also be done as a result of a review or examination mechanism or future rounds of negotiations.

Questions:

- *Have negotiators specific expectations about rollback achievements during the MAI negotiations? Which ones?*
- *Should the negotiation of rollback commitments be envisaged at an early stage of the negotiations? If so, how could this be done?*

- *Do negotiators foresee any role for "peer reviews" such as those conducted under existing OECD instruments to encourage the removal of non-conforming measures?*

e. Transparency

The transparency principle is an essential element of the MAI obligations. It is the vehicle by which information on measures and practices of direct relevance for investment decisions could be made available to governments, investors and others.

Transparency may be achieved through i) notification to the parties or publication; of all relevant measures and modifications thereof, and particularly non-conforming measures, ii) country or horizontal reviews, iii) exchange of information between the parties to the Agreement (e.g. on request).

Questions:

- *Could negotiators comment the various ways by which the MAI could provide for transparency in the liberalisation field?*

f. General exceptions

Existing investment agreements include certain exceptions clauses. The most common one refers to measures taken for national security reasons, public order and international peace and security.

The question arises as to whether the Agreement might allow one or more of these exceptions, possibly with clarifying definitions, conditions on which exceptions may be claimed, and/or obligations on transparency or review.

Questions:

- *Should the MAI provide for general exceptions to the liberalisation obligations? Should these be limited to national security reasons, public order and international peace and security considerations? What kind of safeguards might be contemplated to prevent an abusive recourse to these exceptions?*

g. Reservations

Reservations would define any limitations to the commitments of the parties. They should accurately describe non-conforming measures.

The Agreement would lay down the conditions under which reservations and exceptions may be introduced and may provide for different types of reservations (e.g. for non-conforming measures subject to standstill and rollback commitments, measures falling outside certain obligations, measures not covered by the Agreement...).

A related issue is whether the Agreement should include specific provisions for the treatment of departures from the non-discrimination/MFN principle (see non-discrimination/MFN above).

Questions:

- *Should parties to the MAI be entitled to lodge reservations to any of the obligations of the agreement concerning the treatment of investors?*
- *Should different categories of reservations be contemplated? Temporary? Indefinite? Other? (see rollback above)*

h. Temporary derogations

Many agreements include temporary derogation clauses which allow the introduction of restrictions not otherwise permitted under the agreement. The most common one refers to situations of serious balance-of-payments difficulties. They are generally accompanied by conditions that limit their use.

If a derogation clause were included in the agreement, it could apply to all provisions or only certain limited provisions (e.g. transfer of funds other than in compensation for expropriation).

Questions:

- *Should there be any provision for temporary derogations? In the affirmative, which ones (restrictions on the transfer of funds for balance of payments reasons...) and subject to what limitations?*