



Negotiating Group on the Multilateral Agreement on Investment (MAI)

GEOGRAPHICAL SCOPE OF APPLICATION

GEOGRAPHICAL SCOPE OF APPLICATION

1. Two general questions of geographical scope may be raised in connection with the MAI. First, should special provision be made for "overseas" territories? Second, should the MAI obligations apply, in principle, to investment in all areas under the relevant economic jurisdiction of each Party?

Overseas Territories

2. Normally, unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory. (Article 29, Vienna Convention on the Law of Treaties) Accordingly, no provision is needed to make the MAI fully binding with regard to overseas territories under the sovereignty of a Party¹.

3. Territories for whose foreign relations a party has responsibility are another matter. Their inclusion is not automatic under the law of treaties if they are not part of a party's sovereign territory. There are precedents for allowing such territories to be included, upon declaration by the Party responsible (e.g., Article 11 of the U.K. model BIT, Article 40 of the Energy Charter Treaty).

4. Questions:

-- Do participants wish to provide expressly for Parties to be able to make the MAI applicable to all or some of the territories not under their sovereignty but for the foreign relations of which they are responsible?

Maritime Zones and Continental Shelf

5. Now that coastal states have extensive sovereign rights for economic activities beyond territorial limits, in the exclusive economic zone and over the continental shelf (Articles 56 and 77, UN Convention on the Law of the Sea), it has become a fairly general practice to draft investment agreements to include those areas within their geographic scope.²

1 A provision would only be needed if a special arrangement, e.g. a lower level obligation, were envisaged. The common article 1 of the Codes of Liberalisation contains a "best efforts" clause regarding overseas territories, but such a clause is not generally found elsewhere and its meaning would depend, in each case, on what constitutional authority the government had over the territory in question.

2 E.g., Energy Charter Treaty, Article 1(10); NAFTA, Article 201.1; and model BITs of: Australia, Article 1(g); Canada, Article 1(k); France, Article 1.5; Germany, Protocol, paragraph (2); Netherlands, Article 1(c); Switzerland, Article 1(3).

6. Though the OECD Codes were drafted prior to the recognition of sovereign rights to economic exploitation of the EEZ and continental shelf, and their wording doesn't address this directly, the Capital Movements Codes has recently been interpreted to apply to relevant activities in those areas.³

7. Questions:

- Do participants agree, as a general principle, that the scope of the MAI should include the areas beyond the limits of the territorial sea in which a coastal state party exercises sovereign rights or jurisdiction over resources in accordance with international law?
- Is there any need for exceptions to this principle and, if so, of what scope?

3 Norway: Examination of Foreign Direct Investment Measures. [C(95)49, paragraph 15] The CIME and CMIT did not need to decide whether the EEZ and continental shelf were within the geographic scope of the terms of the Capital Movements Code, since its terms made the location of the "enterprise" or "undertaking" the critical issue, not the place where the enterprise or undertaking carried out its activities, and the relevant activities in these areas would almost always be associated with some land-based administration or office. The applicability of the Code to activities in its EEZ or on its continental shelf by enterprises or undertakings with such a land-based presence was accepted by Norway.