



Negotiating Group on the Multilateral Agreement on Investment (MAI)

THE MAI AND BILATERAL, REGIONAL AND SECTORAL AGREEMENTS

(Note by the Chairman)

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1. In some cases, MAI provisions will overlap with provisions of such agreements as the NAFTA, Mercosur, the Energy Charter Treaty and bilateral investment treaties. The Chairman's Note entitled "The Relationship Between the MAI and the WTO Agreements" [DAFFE/MAI(96)21] identifies and discusses the kinds of issues that are likely to arise when overlap occurs. This paper addresses a specific issue: should the MAI provide that its provisions shall not be interpreted so as to derogate from provisions in other agreements that provide more favourable treatment to an investor or investment?

2. It has been customary in a number of countries' bilateral investment treaties to address this issue expressly and to provide that the treaty is not to be construed as derogating from existing, more favourable provisions¹. In the case of the Energy Charter Treaty, this practice was also followed, with some modification, including a novel provision from a different perspective; that is, that nothing less favourable in other agreements is to be construed as derogating from the ECT. The question is whether a provision of either sort should be included in the MAI. Is there a legal need for such a clause to preserve provisions in some agreements, particularly bilateral treaties, that may be more favourable in some respects than a corresponding MAI text?

3. From a legal perspective, the need for a non-derogation clause is questionable. A more generous existing agreement would not be overridden by a less generous MAI provision. A later provision would override an earlier provision to the extent it was incompatible², but incompatibility is essentially a matter of intent. Successive investment instruments share the common objectives of investment liberalisation and protection, and are intended to grant rights to private parties, not curtail them.

4. However, non-derogation clauses cause no harm³. The traditional BIT provision makes clear what otherwise may require a legal explanation; its omission from the MAI could cause unnecessary questions. The additional ECT provision might be of some interest with respect to a future investment agreement that has some terms less favourable than those of the MAI but omits the traditional BIT provision.

5. It should be noted that the Energy Charter Conference is currently engaged in negotiation of a supplementary treaty that would apply the N/MFN treatment standard to the making of investments. This agreement, which is scheduled to be completed by the end of 1997, would cover on a sectoral basis a number of issues which would also be addressed in the MAI. There should be no conflict between the supplementary treaty and the MAI provided that neither operates to derogate from the other.

¹ e.g., Article 8(1) of the German model BIT, Article 11 of the UK model BIT, Article XI of the US model BIT, Article 3(5) of the Netherlands model BIT, and Article 7 of the Swiss model BIT. (See Selected Articles from Existing Investment Agreements: Protecting Investor Rights arising from other agreements DAF/MAI/RD(95)13).

² The general legal rule for such situations, set out in Article 30 of the Vienna Convention on the Law of Treaties, is that, absent specific provision, as between parties to successive treaties which both remain in force, "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."

³ The Report of Drafting Group N° 1 indicated that a provision for more favourable treatment might be linked to the issues of a "respect clause", and, by implication, to its controversy. (See DAF/MAI(96)16, page 16, paragraph 7.) This would be the case if the "more favourable treatment" provision were drafted to make the provisions of those other sources into an MAI obligation, but none of the models examined does so; rather, each deals with the interpretation and intent of the model itself.

5. **Questions:**

- a. *Does the Negotiation Group wish to include a provision clearly indicating that the MAI is **not** intended to derogate from provisions of other sources giving investors more favourable legal treatment?*
- b. *Should the MAI also explicitly state that it **is** intended to prevail over provisions of other sources giving investors less favourable treatment?*
- c. *Should such a provision be limited to other international agreements, as is done in the ECT, or should it cover the broader range of sources identified in the traditional BIT provision?*