



---

**Negotiating Group on the Multilateral Agreement on Investment (MAI)**

**NON-DISCRIMINATORY BARRIERS TO ESTABLISHMENT**

**(Note by the Chairman)**

## NON-DISCRIMINATORY BARRIERS TO INVESTMENT

(Note by the Chairman)

### **I. Introduction**

1. At its March 1996 session, the Negotiating Group held an initial exchange of views on whether the National Treatment and MFN obligations of the MAI would be sufficient to bring about effective equality of competitive opportunities for foreign and domestic investors, notably when confronted with the same restrictions or regulatory requirements [DAFFE/MAI/M(96)2]. Contributions by two delegations argued in favour of a provision in the MAI, such as those in the GATS, to deal with barriers to investment that might not be caught by the National Treatment/MFN obligations.

2. Many delegations thought that further work on this issue would be necessary before deciding whether the MAI should contain additional provisions to National treatment and MFN. They noted that the concept of “market access” was relevant to the issue, but needed to be carefully defined in an investment context to determine whether and how non-discriminatory barriers to investment should be captured by the MAI. Some also cautioned against being too ambitious given the short time available to conclude the negotiations.

3. The Chairman proposed that further discussion take place to delimit the nature of the problem to be addressed and to identify the most obvious non-discriminatory barriers in order to decide what could be done on a practical basis. He was also of the opinion that in considering possible solutions, a good starting point would be the disciplines in other international agreements (GATS, NAFTA, OECD Codes, ...).

### **II. Existing disciplines**

4. The subject of non-discriminatory measures is addressed in two articles of the GATS. First, in defining the National Treatment Standard, Paragraph 3 of Article XVII provides that formally identical treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of a Member compared to like services or service suppliers of any other Member. Second, Article XVI on Market Access prohibits, with respect to the four modes of supply, including supply through commercial presence in the host country, and in those service sectors where market access commitments are undertaken, a number of measures which, even applied on a National Treatment basis, are considered to act as either quantitative or qualitative restrictions to services suppliers.

5. The measures specifically listed in Article XVI are a) limitations on the number of service suppliers whether in the form of numerical quotas or the requirement of an economic needs test; b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test; c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or

the requirement of an economic needs test; d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a particular service in the form of numerical quotas or the requirement of an economic needs test; e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

6. The investment chapter of NAFTA (chapter 11) does not refer specifically to the concept of “equality of competitive opportunities” nor “market access”. However, under Chapter 12, which deals with cross-border trade in services, the Parties are required to notify existing and future quantitative restrictions. The Parties are also committed to consider periodically, through negotiations, the liberalisation or removal of the quantitative restrictions they have listed in their respective schedules (Article 1207). The Financial Services chapter establishes, in article 1403, the general principle that qualitative restrictions (legal form requirements) should not be maintained. Article 1405 states that identical treatment shall be considered to be consistent with National Treatment only if it affords equal competitive opportunities.

7. Under the OECD Codes of Liberalisation, legal form requirements (such as incorporation or joint venture requirements), even if applied to residents and non-residents alike, are considered restrictions, as can be seen by country-specific reservations. While market needs tests are permitted for branches of insurance companies, they have been specifically excluded from the amended Code rules on Banking and Financial Services. Non-discriminatory measures can also be subject to periodic country examinations or the consultation procedures.

8. Article 73b(1) of the EC Treaty states that “Within the framework of the provisions of this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.” This amounts to granting foreigners an absolute right to invest in the European Union (above the relative standard of National Treatment) independently of the respective rights of domestic investors.

### **III. The MAI**

9. Discussions of MAI provisions since the orientation debate last March have touched upon certain aspects of non-discriminatory barriers to investment. Other aspects may also be considered in the context of possible future work of the MAI Drafting or Expert Groups.

10. It has been established that the National Treatment/MFN provisions of the MAI would address any problem of *de facto* as well as *de jure* discrimination [see commentary in DAF/MAI(96)16/REV1]. They would therefore cover cases of discrimination resulting from identical measures which intend or have the effect (authorisation procedures for example) of providing less favourable treatment to foreign investors and their investments as compared to domestic investors or their investments. Drafting Group n°2 considered the merits of introducing the concept of “equal competitive opportunities”. However, several delegations expressed the view that it could create confusion and uncertainty as to how to apply the National Treatment/MFN obligations. Others feared that it could bring under these obligations certain “market access” measures unrelated to National Treatment/MFN.

11. With respect to market access barriers identified in Article XVI of the GATS (and recalled in paragraph 5 above), it would appear that measures which restrict or require specific types of legal entity

for an investor and its investment (item e) would be captured by the MAI definition of “investment” which includes “a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation” [see section A.2(i) of DAFFE/MAI(96)16/REV1]. The National Treatment/MFN articles would similarly cover limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

12. It should also be noted that certain types of limitations on the number of services suppliers [item a) of paragraph 5], on the total value or quantity of business [items b and c) of paragraph 5] or number of natural persons to be employed in a particular sector or in a given enterprise [item d) of paragraph 5] are being examined by the Expert Group on “Special Topics” under various headings (monopolies and exclusive suppliers arrangements export requirements, sale requirements, key personnel, ...). It may therefore be premature to pass judgement on the merits of market access provisions in these areas before the completion of the Expert Group work.

13. In view of the work carried out so far, “economic needs tests” would appear to be the most important category of measure listed in Article XVI of the GATS which has not been addressed, in one way or another, by existing Drafting or Expert Groups. This type of measure has been most frequently used (and still is in some non-OECD countries) in services sectors, notably financial services. It may not be entirely precluded from other sectors or activities.

#### *Questions*

- a) In view of the intended “de jure” and “de facto” application of the National Treatment/MFN obligations of the MAI, is there a need to consider further the introduction of the concept of equality of competitive opportunities into the Agreement or should this notion be reserved to special instances (such as branches of financial institutions)?*
- b) Are delegations satisfied that the relevant “market access” issues (with the exception of market needs tests) are being considered by existing Drafting Groups and Expert Groups?*
- c) How should “market needs tests” be addressed?*