



Negotiating Group on the Multilateral Agreement on Investment (MAI)

PERFORMANCE REQUIREMENTS

(Note by the Chairman)

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1. Performance requirements (PRs) can be used by host governments to try to influence the behaviour of foreign investors and secure certain benefits for their economies. They can distort investment decisions by imposing conditions on investors that are not related to market considerations.
2. PRs can be imposed both at the pre- and post-establishment phases. They may constitute conditions for obtaining a government authorisation to invest in the context of screening mechanisms or licensing requirements in specific sectors. They may also result from regulatory requirements that are imposed on all investors, whether domestic or foreign.
3. PRs can also be made a condition to secure a government advantage or incentive such as tax reductions, financial assistance or a government contract.
4. In all these instances, PRs can create legal obligations on foreign investors or their investments that can lead to penalties in the case of non-compliance.
5. There are two major categories of PRs:
 - One broad category are PRs on trade and local production. These PRs include prescriptions on imports and exports, foreign exchange restrictions, local content requirements, export performance requirements and trade balancing requirements.
 - Another major category relates to the capital structure and management of an investment such as local equity requirements, local hiring targets, technology transfer, nationality of management and repatriation of funds and profits.
6. The most frequent PRs are export requirements, local content requirements, trade balancing requirements, restrictions on domestic sales tied to export performance, technology transfer requirements and exclusive supplier requirements.

A. Existing disciplines

7. The most comprehensive disciplines on PRs are found in the TRIMS Agreement adopted in the Uruguay Round and those in NAFTA. The Energy Charter Treaty and a few bilateral agreements (such as the US BITS and Canadian FIPAs) also have obligations on PRs but their application is more limited.

8. In all cases, the obligations go beyond the general liberalisation disciplines of National Treatment, MFN and Transparency and involve a general prohibition on covered PRs, whether or not these PRs are applied in the same manner to domestic and foreign firms. Under the TRIMS Agreement, they must be phased out within a given time table which varies between developed countries, developing countries and least developed countries. Under NAFTA, PRs are subject to standstill and roll-back obligations.

9. The great majority of the PRs covered by existing disciplines concern PRs linked to trade and local production. The TRIMS Agreement offers an illustrative list of such measures, namely local content, trade balancing, import substitution, foreign exchange and export limitations requirements. The same PRs also appear in the Energy Charter Treaty, NAFTA and Canada and US BITs. The coverage of NAFTA and these BITs is significantly broader, however, as it includes all types of export requirements and extends to services.

10. The coverage of NAFTA also extends to PRs which are not specifically trade-related, notably technology transfer and exclusive suppliers requirements.

11. Existing disciplines sometimes include, in addition, special provisions on the use of PRs as a condition of the receipt of an advantage or an investment incentive. This is the case under the TRIMS Agreement and the ECT and some PRs covered by NAFTA. There are nevertheless a number of exclusions. For instance, the ECT allows TRIMS involving a "rule of origin" as a condition of product eligibility for export promotion, foreign aid, government procurement or preferential tariffs or quota programmes. The NAFTA prohibition does not apply to conditions to locate production, provide a service, train or employ workers or construct or expand particular activities, or carry out R&D.

12. All existing disciplines on PRs are subject to the dispute settlement provisions of the agreements concerned.

B. The MAI

13. Since the MAI is aimed to be a high standard agreement, consideration needs to be given to including specific disciplines on PRs that may have distorting effects on investment decisions, drawing as appropriate on existing disciplines in this area.

14. Discriminatory PRs could be captured by the principles of National treatment and Non-discrimination/MFN. The MAI could break new ground by prohibiting PRs not presently subject to international disciplines. MAI could cover trade and production requirements not covered by TRIMS (e.g. export requirements) or non-trade requirements (e.g. technology transfer and exclusive supplier arrangements). Consideration needs to be given to including all or only some of these PRs if linked to investment incentives.

15. As with other MAI issues, it is understood that PRs may have implications for other disciplines developed under the Agreement and this would need to be taken into account. Similarly, consideration would

need to be given to the interface between MAI provisions on PRs and existing disciplines such as the TRIMS Agreement.

16. In light of these observations Delegations are invited to respond to the following questions.

- a) *Should the MAI contain specific provisions on performance requirements, whether or not linked to investment incentives? Should these provisions contain a general prohibition, together with standstill and roll-back for any non-conforming measures?*
- b) *Should the MAI go beyond the scope of the TRIMs Agreement and include all trade-related investment measures including export requirements and PRs applied to services ?*
- c) *Should the disciplines extend further to include other types of PRs which distort investment, including technology transfer requirements, product mandating and exclusive supplier requirements ?*
- d) *If the MAI disciplines on PRs include those related to incentives, should these obligations cover the same types of PRs as those linked to investment authorisations or other national regulations?*