



Negotiating Group on the Multilateral Agreement on Investment (MAI)

**GENERAL EXCEPTIONS, COUNTRY SPECIFIC RESERVATIONS,
TEMPORARY DEROGATIONS**

(Note by the Chairman)

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1. At its meeting on 24-26 October, the Negotiating Group had a first discussion on general exceptions, country reservations, and temporary derogations in the context of its examination of the treatment of investors and investment.

2. Most Delegations thought that the discussion had succeeded in identifying the issues but that more consideration was needed before delegates were ready to remit them to a drafting group. It was agreed that a written version of the Chairman's summary of the discussion would be made available so that capitals could be consulted more fully on the issues in question.

3. Accordingly, the following is a summary of the chairman's conclusions, together with questions for consideration.

General Exceptions

4. The discussion in the Negotiating Group revealed that while it is likely that the MAI will contain general exceptions, there should be a critical attitude to them. It follows from this that the number of these exceptions should be as limited as possible. "General" means that they are applicable to all Members of the MAI. It does not mean that they are applicable to all obligations.

5. Thus, the objective should be to narrow the scope of traditional general exceptions, particularly with the view to avoid abuses which may be motivated by commercial economic/protectionist reasons. The MAI should limit both the number, as well as the scope, of the general exceptions. A further point is that general exceptions should apply on a non-discriminatory basis.

6. Three types of general exceptions were mentioned: national security, international peace and security, and public order.

7. As far as *national security* is concerned, several positions were expressed:

- that the MAI be "self-judging" as to measures based on national security;
- that the MAI provide a dispute settlement recourse for such measures,
- that the instrument contain a review mechanism, or some other kind of control,
- that a country invoking national security be subjected to examination,
- that transparency disciplines should apply,
- that the definition of national security and the obligations to which such exceptions can apply be narrowed down as much as possible.

8. As far as *international peace and security* is concerned:

- a reference was made to the United Nations Charter, but some countries doubted that it was necessary to have such a provision when the only link is to the UN Charter because that is already international law.

9. As far as *public order* is concerned:

- A number of delegations raised the question what could public order be that it would force discrimination against foreign investors on that basis.
- There was a suggestion that public order might be meant to include health care, but the majority of delegations did not react to this suggestion, so it is unlikely that public order is meant to cover health, or health care systems.
- Another suggestion was that public order could encompass measures to combat money laundering. But the question was posed whether perhaps it could be better dealt with in the transfer article and not here as an element of public order.

10. In summary, it would seem that the MAI would need to provide for a general exception based on national security, although the modalities need still to be examined. While not excluding, at this point, exceptions based on international peace and security and public order, the necessity for allowing exceptions on this basis were less obvious.

11. The Secretariat was invited to make an analysis of experiences in other OECD instruments which may provide for general exceptions and on the basis of that analysis to suggest whether the MAI could narrow down the national security formulation.

12. Proposed Questions for consideration

If the objective of the MAI is to provide the most favourable conditions for investors and investments, should it allow for minimal general exceptions, i.e. only those relating to national security (in whatever way it is treated under the instrument)? Is there any persuasive economic argument in favour of measures based on public order or international peace and security which would justify discrimination against foreign investors or investments? Would the answer vary depending on whether the measure relates to the pre or post establishment phase of investment?

What controls should be written into the MAI to avoid abuse and to guarantee more consistency in application among Member countries: a requirement that such measures not constitute disguised restrictions -- application only to limited sectors -- transparency disciplines, including periodic examination -- resort to dispute settlement?

Country Specific Reservations

13. The discussion dealt with, on the one hand, the principles and, on the other hand, the scope of these reservations. As far as the general approach to country specific reservations is concerned, it was agreed that the MAI should try to reduce the number of reservations and should also try to define them as narrowly as possible.

14. The question was raised as to how to achieve a reduction of reservations: is the request and offer approach used in trade negotiations feasible in an agreement dealing with investment. If not, we need to consider other ways to improve market access and investment security for investors. In order to improve on the present situation, negotiations are needed to reduce existing reservations at some point in time.

15. Realistically, there will be a number of country specific reservations but they must be controlled by principles: Some of these principles may include:

- country specific reservations are only acceptable when they are on the list beforehand, inscribed in the agreement. No new reservations would be acceptable,
- no reservations on the basic principle of most favoured nation,
- no reservations on the protection obligations,
- this element should be combined with no reservations in the post-investment phase but eventually only in the pre-establishment phase.
- should not be done on a discriminatory basis,
- all reservations should be on a temporary basis,
- the transparency mechanism is relevant for reservations (as well as for standstill and rollback which are intended to limit reservations).

16. With a view to providing updated information on existing restrictions, the Secretariat was requested to update the publication on Controls and Impediments to Foreign Direct Investment.

17. Proposed Questions for consideration

In light of the discussion at the last meeting, delegates should consider the list of principles as summarised above and determine whether and how these could be taken account of in the MAI.

Temporary Derogations

18. The only substantive discussion concerned a derogation for a balance of payment problem; the need for which was often linked to the definition of investment:

- Some countries said they could see the need to provide for the possibility for temporary derogations, especially when there is a very broad definition of investment,

- Others remarked that therefore it would not be needed when capital movements are formulated a little more narrowly. Several thought that even a broad definition of investment would not justify a balance of payment derogation.

19. This triggered another argument for providing for derogations on the basis of a balance of payment problem and that had to do with third countries. This is legitimate, but it also touches on a fundamental point. What could be accomplished within a smaller number of like-minded countries might not be feasible in negotiations among a broader number of countries. The argument to provide for derogations on the basis of balance of payments was that without it, it would be hardly feasible to have third countries accede to the agreement. If this argument is accepted, it needs to be made clear in what way and how far the MAI should be made accessible to countries not ripe yet for a strong instrument.

20. Other questions referred to prudential controls in the banking sector, but some delegations felt that the GATS example was perhaps not so suitable.

21. Proposed Questions for consideration

Assuming a definition of investment in the MAI which goes beyond FDI and extends to financial assets, would delegates comment on what economic situation would justify a BOP derogation (among Member countries/non-Member countries)?

Would facilitating accession to the MAI by non-Members countries be sufficient to justify including a BOP derogation in the MAI? Would there be other ways of meeting this concern, such as transitional arrangements?

Would delegates agree to seek the highest standards in the MAI from the point of view of the investor and address, at a later stage, the broader issue of ensuring consistency between the MAI and other international agreements, in particular the IMF Agreement?