



Negotiating Group on the Multilateral Agreement on Investment (MAI)

REGIONAL ECONOMIC INTEGRATION ORGANISATIONS

(Note by the Chairman)

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1. One of the objectives of the negotiations is to achieve an agreement, with a satisfactory scope and balance of commitments that would, inter-alia, deal with measures taken in the context of regional economic integration organisations (REIOs). At the same time, it has been agreed to define the basic obligations of national treatment and MFN in full and unconditional terms.
2. International agreements often contain specific provisions on REIOs. The question arises whether a clause for REIOs would be included in a MAI. If so, the scope and qualifications of such a clause would need to be defined. Some argue that internal liberalisation in the REIO prepares the way for progress in the multilateral field. Others question the need to distinguish between members of a REIO and those that are not members and consider that such a distinction upsets the balance of commitments.
3. Proponents of a REIO clause want an exception to MFN to prevent liberalisation benefits of the integration agreement from being automatically extended to non-members and they want some flexibility as regards future legislative activities based on mutual recognition which might require the introduction of new measures contrary to national treatment.

Treatment under existing instruments

4. Article 10 of the **OECD Codes of Liberalisation** provides that Members forming part of a special customs or monetary system may apply to one another..... measures of liberalisation without extending them to other Members". This allows for further liberalisation but does not permit the introduction of new restrictions.
5. Article V of the **GATS** (see Annex) provides that the agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalising trade in services between or among the parties, on condition that the agreement has "substantial sectoral coverage" and provides for rollback and/or standstill as regards "discriminatory measures". The effect is to provide an exception from MFN if the Article V agreement comprises obligations for additional/more advanced liberalisation between the parties to it. Such additional liberalisation must not however, raise "the overall level of barriers" within a sector or sub-sector. This allows new restrictive measures against third countries as long as they are compensated by new liberalisation of which they may benefit, and provided they do not run counter to a Member's specific commitments.
6. Article 25 of the **ECT** (see Annex) contains an explicit exception to MFN by providing that the provisions of the treaty shall not oblige a "Contracting Party which is party to an Economic Integration Agreement (EIA) to extend, by means of most favoured nation treatment, to another Contracting Party which is not a party to that EIA, any preferential treatment applicable between the parties to that EIA as a result of their being parties thereto." Unlike the GATS, there is no requirement that the overall level of barriers must not be higher.
7. Most **bilateral investment protection treaties** provide for an exception to MFN for customs unions, regional economic organisations, or similar organisations. The United States' bilateral treaties do not have this type of clause but allow a party to adopt or maintain exceptions to the national treatment and MFN obligations of the treaty in the sectors, or with respect to matters specified in an annex to the treaty.

8. The **OECD National Treatment** instrument does not contain an explicit MFN provision. However, the CIME has issued a clarification that Member countries should not discriminate between other Members when applying or removing measures contrary to National Treatment¹. There is no exception for measures taken by REIOs.

The MAI

9. The assumption is that the MAI needs to address the question of how to deal with measures taken in the context of a REIO. For existing non-conforming measures, the MAI could treat these measures in the same way as other existing measures, i.e., it could provide that the measures be grandfathered in schedules of reservations by country and by REIOs wherever there is REIO competence. Standstill on these restrictions could also apply. This would be subject to agreement on how many existing discriminatory measures would be acceptable at the time of the agreement entering into force.

10. If the MAI were to allow for new or future measures taken by a REIO, the MAI could provide for a general exception which allows exceptions to MFN and/or exceptions to standstill. Another approach would be to provide for sector specific reservations for such measures.

11. Under either approach it would be necessary to define a REIO. Would this include a customs union, a free trade area, or other looser arrangements? The GATS provides, for example, that for an arrangement to fall under the exception, there must be "absence or elimination of substantially all discrimination". Under the ECT, agreements "substantially liberalising i.a. trade and investment" are eligible. For the MAI, a narrower definition based on arrangements involving the mutual recognition and harmonisation of laws and regulations could be considered.

General exception approach

12. The scope of a general exception provision might vary depending on:

- how broadly or narrowly a REIO would be defined;
- whether the provision would allow for MFN exceptions similar to that in the OECD Codes, (i.e., members of a REIO could abolish exceptions among themselves without extending these to non-REIO members; but they would not be permitted to introduce exceptions to standstill, i.e., the introduction of new measures contrary to national treatment);
- whether the provision would also allow for exceptions to standstill, perhaps conditioned on the requirement that any reduction in liberalisation by an individual country is compensated by the degree of new liberalisation offered by the REIO as a whole;
- any other limitation, such as submitting such measures to rollback.

¹ National Treatment for Foreign Controlled Enterprises, Paris, 1993

Sector specific approach

13. This approach might allow for a party, member of a REIO, to adopt and/or maintain specific reservations to national treatment and MFN by sector. The reservation could be applicable to all sectors, or particular sectors could be identified, e. g., those sectors for which common REIO action is anticipated. The scope of the reservation would depend on the definition of a REIO as well as any limitations that might be attached for invoking the reservation.

Questions:

- a) How should REIOs be defined?
- b) How should the MAI deal with measures taken in the context of REIOs?
 - For existing non-conforming measures, should REIO exceptions be listed in the same way as other country specific non-conforming measures?
 - For future measures, should there be a general exception approach or a sector specific approach? What scope should be allowed for new discriminatory measures?
- c) Should a possible REIO clause apply to both pre and post-establishment?
- d) Should there be a role for the Parties Group to review such measures? Should dispute settlement apply?

ANNEX

OECD Code of Liberalisation of Capital Movements: Article 10

EXCEPTIONS TO THE PRINCIPLE OF NON-DISCRIMINATION

SPECIAL CUSTOMS OR MONETARY SYSTEMS

Members forming part of a special customs or monetary system may apply to one another, in addition to measures of liberalisation taken in accordance with the provisions of Article 2(a), other measures of liberalisation without extending them to other Members. Members forming part of such a system shall inform the Organisation of its membership and those of its provisions which have a bearing on this Code.

Energy Charter Treaty: Article 25

ECONOMIC INTEGRATION AGREEMENTS

(1) The provisions of this Treaty shall not be so construed as to oblige a Contracting Party which is party to an Economic Integration Agreement (hereinafter referred to as "EIA") to extend, by means of most favoured nation treatment, to another Contracting Party which is not a party to that EIA, any preferential treatment applicable between the parties to that EIA as a result of their being parties thereto.

(2) For the purposes of paragraph (1), "EIA" means an agreement substantially liberalizing, inter alia, trade and investment, by providing for the absence or elimination of substantially all discrimination between or among parties thereto through the elimination of existing discriminatory measures and/or the prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time frame.

(3) This Article shall not affect the application of the GATT and Related Instruments according to Article 29.

GATS: Article V

Economic Integration

1. This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:

(a) has substantial sectoral coverage², and

(b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:

²This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply.

(i) elimination of existing discriminatory measures, and/or

(ii) prohibition of new or more discriminatory measures,

either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis.

2. In evaluating whether the conditions under paragraph 1(b) are met, consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalization among the countries concerned.

3. (a) Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

(b) Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

4. Any agreement referred to in paragraph 1 shall be designed to facilitate trade between the parties to the agreement and shall not in respect of any Member outside the agreement raise the overall level of barriers to trade in services within the respective sectors or subsectors compared to the level applicable prior to such an agreement.

5. If, in the conclusion, enlargement or any significant modification of any agreement under paragraph 1, a Member intends to withdraw or modify a specific commitment inconsistently with the terms and conditions set out in its Schedule, it shall provide at least 90 days advance notice of such modification or withdrawal and the procedure set forth in paragraphs 2, 3 and 4 of Article XXI shall apply.

6. A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement.

7. (a) Members which are parties to any agreement referred to in paragraph 1 shall promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. They shall also make available to the Council such relevant information as may be requested by it. The Council may establish a working party to examine such an agreement or enlargement or modification of that agreement and to report to the Council on its consistency with this Article.

(b) Members which are parties to any agreement referred to in paragraph 1 which is implemented on the basis of a time-frame shall report periodically to the Council for Trade in Services on its implementation. The Council may establish a working party to examine such reports if it deems such a working party necessary.

(c) Based on the reports of the working parties referred to in subparagraphs (a) and (b), the Council may make recommendations to the parties as it deems appropriate.

8. A Member which is a party to any agreement referred to in paragraph 1 may not seek compensation for trade benefits that may accrue to any other Member from such agreement.