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**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)

1. The MAI Negotiating Group at its session in October 1995 discussed the issues relating to the treatment, pre- and post-establishment, of investors and investments under the MAI. Whereas most of the issues under consideration were put to a drafting group to develop proposals for texts, one issue was reserved for a more extensive discussion in the Negotiating Group. It is the question whether obligations on national treatment and MFN are sufficient to bring about effective equality of competitive opportunities for foreign and domestic investors alike, notably when both domestic and foreign firms are confronted with the same restrictions or regulatory requirements.

2. Various regulations and practices exist which, although not primarily intended to discriminate against foreign investors, may result in *de facto* barriers to investment or may reduce the ability of an investor to compete on equal terms with domestic firms. These restrictions can either be of a *qualitative* or of a *quantitative* nature. A monopoly is an example of a non-discriminatory quantitative restriction limiting market access for foreign and domestic investors alike. Whereas monopolies are specifically discussed in the context of the MAI others, such as “economic needs tests” or limitations on the total number of operators in a particular sector, are not. Legal form requirements (most often an obligation to incorporate an investment) are an example of a qualitative restriction which is not uncommon in the financial services sector.

### Existing disciplines

3. Some multilateral and plurilateral disciplines exist which are aimed at overcoming certain non-discriminatory barriers for investment. Article XVI of the GATS (Market access) contains the main multilateral rules in this regard. It prohibits (in services sectors where market access commitments are undertaken) a number of measures that act as either quantitative or qualitative restrictions, unless they have been specifically listed. Articles XVII (National treatment) states that formally identical treatment shall be considered to be less favourable to foreign service suppliers if it results in conditions of competition which are more favourable to domestic service suppliers.

4. The NAFTA in its Art. 1207 (Trade in Services) requires Parties to notify existing and future quantitative restrictions. There are thus no standstill or rollback obligations although the Parties are committed to consider periodically, through negotiations, the liberalisation or removal of the quantitative restrictions they have listed in their respective schedules. Art. 1403 (Financial Services) acknowledges the general principle that qualitative restrictions (legal form requirements) should not be maintained. Art. 1405 states in particular that identical treatment is consistent with national treatment so long as it affords equal competitive opportunities.

5. Under the OECD Capital Movements Code, legal form requirements, even if they apply to residents and non-residents alike, are considered restrictions as can be seen from country specific reservations. While the Code does not contain legally-binding provisions on non-discriminatory quantitative restrictions, these measures are covered by the periodic country examinations. They may also be subject to the consultation procedures of the Code.

## **The MAI**

6. The orientation debate which has taken place in the Negotiating Group so far suggests that the MAI might contain disciplines on aspects of the market access limitations covered by existing international agreements. For example, measures that restrict or require specific types of legal entity for an investor and its investment could be addressed in the context of the discussions on the definition of an investor or an investment (namely in the definition of “enterprise”). Non-discriminatory performance requirements could be subject also to specific MAI disciplines. The Negotiating Group is to discuss possible disciplines for monopolies.

7. It may also be noted that most of the market access problems that have been associated with non-discriminatory measures relate to the services sectors. These sectors are often more regulated than other economic activities. It is also in these sectors that the majority of sectoral restrictions on foreign investment are found.

### *Questions*

- a) Should the MAI contain specific provisions on non-discriminatory measures? If so, should these provisions focus exclusively on quantitative restrictions such as market need tests or numerical quotas? If not, what other types of non-discriminatory restrictions should the MAI specifically cover?*
- b) Should these MAI disciplines involve transparency obligations? Standstill commitments? Roll-back commitments? Peer review? A combination of these?*