



Negotiating Group on the Multilateral Agreement on Investment (MAI)

**Drafting Group No.2 on Selected Topics Concerning Treatment of Investors and Investment
(Pre/Post Establishment)**

**MECHANISMS FOR STANDSTILL, ROLLBACK
AND LISTING OF COUNTRY SPECIFIC RESERVATIONS**

(Note by the Chairman)

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I. INTRODUCTION

1. As part of its extended mandate, the Drafting Group has been requested to consider mechanisms for standstill, rollback and the listing of country specific reservations under the MAI. The following note outlines possible approaches for dealing with these issues, given the guidance provided by the Negotiating Group at its October and December 1995 meetings [see items 4b of documents DAFFE/MAI/M(95)2 and DAFFE/MAI/M(95)3].

2. At the Drafting Group's meeting on 22-24 January 1996, Delegates will be invited to discuss these issues with a view to elaborating proposals for the Negotiating Group. Unlike the other subjects covered by its mandate, the Drafting Group has not been requested to draft specific articles on these subjects. The Drafting Group is due to report back to the Negotiating Group on the results of its work in March 1996.

II. STANDSTILL

3. A standstill obligation under the MAI would mean the imposition of the *status quo* on existing measures and practices which do not conform with a given or pre-defined set of provisions in the Agreement. This obligation would exclude the introduction of new non-conforming measures unless specifically provided by the Agreement.

4. Standstill would lock in the treatment accorded to investors or their investments on the date of entry into force of the MAI. It would be an essential component of a "top down" approach to the listing of non-conforming measures when the full treatment required by the MAI could not be met. It would be the starting point for further improvements, via rollback, to the treatment accorded by a Contracting Party to investors of another Party or to their investments.

5. It is for consideration in the Negotiating Group whether standstill could apply to any obligations of the MAI, and in particular to:

- National Treatment, Non-discrimination/MFN. These obligations are expected to be subject to standstill with very few exceptions;
- "Special topics" such as key personnel, performance requirements and investment incentives. Standstill obligations in these areas will be discussed at the January and March 1996 meetings of the Negotiating Group;
- Investment protection. This is an area where non-conforming measures might not be allowed.

6. The standstill principle would not, however, prevent the adoption of new non-conforming measure in accordance with the general exceptions (e.g. national security) or general derogations of MAI.

It would not preclude an amendment to a non-conforming measure to the extent that such amendment did not increase the non-conformity of the measure.

7. Standstill obligations could be tailored to the specific reservations lodged by the Contracting Parties. Under such an approach, each Contracting Party would be required to notify all non-conforming measures, as well as any modification to a non-conforming measure according to the Transparency provisions of the Agreement [see DAF/MAI/DG2(95)1/REV1]. These measures could be covered by reservations listed in country schedules annexed to the Agreement. These reservations could be drafted so as to describe in precise terms the nature and scope of application of each non-conforming measure and ensure that the reservation corresponds to the measure. For the standstill obligation to be effective, it would be necessary that the scope of the reservation be not broader than the measure. Any backsliding would be subject to the dispute settlement provisions of the Agreement.

8. Delegates are invited to react to these proposals. They could indicate, in particular, whether standstill could be given effect via a MAI article on Reservations. This article could specify the obligations to which non-conforming measures could be maintained. It could make it clear that no new non-conforming measures could be introduced in addition to the non-conforming measures listed. It could indicate that an amendment to a non-conforming measure would not be permitted unless it did not decrease the conformity of the measure. Any violation to standstill could be subject to the dispute settlement provisions of the Agreement. The precise modalities for addressing such a breach of MAI obligations should be considered by the Experts Group on Selected Issues concerning Dispute Settlement and Geographical Scope.

III. ROLLBACK

9. Rollback is the liberalisation process by which the reduction and eventual elimination of non-conforming measures to the MAI would take place. It is a dynamic element linked with standstill, which provides its starting point. Combined with standstill, it would produce a “ratchet effect”, where any new liberalisation measures would have to be maintained and could not be rescinded or nullified over time.

10. The discussion in the Negotiating Group has recognised that there are a number of ways for achieving roll-back. The most commonly known in the trade field is that of successive rounds of negotiations where rollback results from the trade-offs or exchange of trade concessions. Peer pressure, on the other hand, has been the approach of the OECD liberalisation instruments. Its main element are the periodic examinations of Member countries’ restrictions. These country reviews aim at encouraging the unilateral liberalisation of restrictions and the extension of the resulting benefits to OECD countries and, whenever possible, to all other members of the IMF as well. Roll-back commitments may also be inscribed in schedules of commitments or list of reservations. While this has not been a generalised practice, it has been done in some cases under the OECD instruments.

11. These approaches are not mutually exclusive and could possibly be combined in the MAI. In particular:

- a) the MAI negotiations could lead to up-front liberalisation commitments which could become effective on the date of entry into force of the MAI. This means that not all restrictions currently maintained would be included in the list of reservations of the Contracting Parties;

- b) rollback commitments could be inscribed in the reservations or the description of non-conforming measures by means of “phase-out” or “sunset clauses” indicating when non-conforming measures would be removed or reduced;
- c) a Contracting Party could be required to modify its reservations to reflect any measures of liberalisation it has undertaken (the ratchet effect). Such liberalisation would need to be notified under the Transparency provisions of the Agreement (see DAF/MAI/DG1/REV1).
- d) the MAI could provide for periodic examinations of non-conforming measures. This could lead to recommendations in favour of the removal or limitations of specific reservations or restrictions. These reviews could be conducted on a country-by-country basis and/or an horizontal basis. This could be specified in the functions of the “Parties Group”;
- e) the MAI could provide for future rounds of negotiations designed to remove any remaining non-conforming measures. The decision to launch future negotiations could be taken at the conclusion of the MAI negotiations and/or could be left to the “Parties Group”. This would need to be specified in the implementation provisions of the MAI.

12. Delegates are invited to comment on the above proposals and on how they could be combined. They may also provide views on how the negotiations of up-front liberalisation commitments might be achieved (by type of measure and/or by sector) and indicate whether the OECD instruments provide a good model for periodic examinations of non-conforming measures leading to further liberalisation.

IV. LISTING OF COUNTRY RESERVATIONS

13. As already noted, the listing of country specific reservations would play a fundamental role for achieving transparency of non-conforming measures. It would also be crucial to the enforcement of standstill and rollback commitments under the MAI. It is therefore appropriate that the Drafting Group make proposals on how the information about non-conforming measures should be presented in the reservations.

14. Special efforts have been deployed in recent years under the OECD instruments to narrow down the scope of reservations to the regulatory situation and avoid general and generic categories of reservations. Particular attention has also been given to the legal source of restrictions notified by Member countries. In fact, the exceptions to the National Treatment Instrument already identify the legislative authority of the measures covered so as to establish a close correspondence between the scope of the reservation and that provided by national legislations or regulations. The same concern underlies the listing of reservations under NAFTA.

15. Drawing on the best features of existing instruments, it would appear that the listing of specific reservations to the MAI under country schedules could include the following elements:

- the sector or sub-sector covered by the reservation ;
- the obligation or MAI article for which the reservation is taken;
- the level of government which maintains the non-conforming measure;
- the legal source or authority of the non-conforming measure;

- the description of the non-conforming measure. This description would reflect the level of liberalisation on the date of entry into force of the MAI; and
- any phase-out commitments for liberalisation after the date of entry into force of the MAI.

16. Delegates are invited to indicate whether this is the type of information which should eventually appear in country specific reservations. They may also discuss a standardised presentation that could apply to all non-conforming measures under the MAI.