



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. GENERAL OBSERVATIONS

1. The objective of the MAI is to be a comprehensive agreement setting high standards of liberalisation and protection for international investors and their investment in all sectors of economic activity. The principles of standstill and rollback would be essential components of the liberalisation standards of the MAI. They would apply to the MAI core obligations of national treatment and MFN/non-discrimination and possibly to other provisions that might be elaborated on the treatment of investors and their investments.

2. Given its high standards and broad coverage, however, the MAI may need to provide the possibility for Contracting Parties to lodge specific reservations on aspects of their respective laws and regulations which do not conform with the obligations of the Agreement. The nature and coverage of these reservations would depend on the scope of the obligations contained in the MAI, which have yet to be determined. The Drafting Group has been requested, however, to examine what would be the most effective mechanisms for applying the standstill and rollback principles to any agreed country specific reservations and non-conforming measures and for listing and describing them. The present note describes the proposals of the Drafting Group on these subjects.

II. STANDSTILL AND THE LISTING OF COUNTRY SPECIFIC RESERVATIONS

3. The fundamental aim of the “standstill principle” is to ensure an irreversible minimum standard for liberalisation through the exclusion of new or additional restrictions. Standstill is also the starting point for the removal, via rollback, of existing restrictions.

4. The standstill principle would not apply, however, to any general exceptions (e.g. national security) or to any temporary derogations (e.g. balance of payments) that might be allowed under the MAI.

5. The Drafting Group considered that the standstill principle should be reflected in the provisions governing country specific reservations. For standstill to apply, these provisions should provide that:

- a) each Contracting Party list all non-conforming measures in an Annex of the Agreement;
- b) the reservations should describe, in the most precise terms possible, the nature and scope of the non-conforming measures. This would ensure that the scope of the reservations is not broader than these measures and, thus, that the reservations are not of a “precautionary” nature;
- c) no additional non-conforming measures could be introduced (and listed) except when the MAI obligations are extended or sectors or activities are demonopolised or privatised;
- d) an amendment to a non-conforming measure would be permitted only if it did not decrease the conformity of the measure; and

e) a breach of standstill should be subject to the dispute settlement provisions of the Agreement.

6. The Drafting Group also considered that a standard presentation of the non-conforming measures listed in Contracting Parties' specific reservations would enhance transparency and facilitate the operation of the Agreement. The Drafting Group felt that specific reservations listed in the schedules of the Contracting Parties should include the following elements:

- a) the sector(s) or sub-sector(s) covered by the reservation ;
- b) the obligation or MAI article for which the reservation is taken;
- c) the level of government which maintains the non-conforming measure;
- d) the legal source or authority of the non-conforming measure; and
- e) the description of the non-conforming measure.

7. For practical reasons, however, the amount of information to be provided should be limited to the minimum necessary to describe the non-conforming measures.

III. ROLLBACK

8. 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 be "locked in" so they could not be rescinded or nullified over time.

9. There are a number of ways for achieving rollback. 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. Rollback 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.

10. Rollback during the negotiations might be achieved through:

- a) liberalisation commitments by the Contracting Parties effective on the date of entry into force of the MAI. This would imply that that not all restrictions currently maintained would be included in the list of reservations of the Contracting Parties;
- b) rollback commitments inscribed in a country reservation or description of a non-conforming measure by means of a "phase-out" or a "sunset clause" specifying a future date when the non-conforming measure would be removed or made more limited in the future. Phase-out or sunset provisions could not be envisaged for all non-conforming measures. They might be useful, however, where the phase-out of a non-conforming measure is inscribed in domestic

legislation or where a Contracting Party is able to commit itself to future liberalisation by a specified date.

11. Rollback after the entry into force of the MAI could result from:

- a) an obligation for a Contracting Party to adjust its reservations to reflect any new liberalisation measure (the “ratchet” effect). This procedure could be monitored by the Parties Group.
- b) periodic examinations of non-conforming measures. These examinations could lead to recommendations in favour of the removal or limitations of specific measures. These reviews could be conducted on a country-by-country basis and/or on an horizontal basis. This could also be specified in the functions of the “Parties Group”; and
- c) 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 or could be left to the “Parties Group”. This would need to be specified in the implementation provisions of the MAI.