



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)**

**REPORT OF THE DRAFTING GROUP ON THE
TREATMENT OF INVESTORS AND INVESTMENTS**

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This report presents the Drafting Group's proposals, with comments, for MAI Articles on National Treatment and Most Favoured Nation Treatment, Transparency, and General Exceptions, as well as proposals for mechanisms to achieve standstill, rollback and the listing of country specific reservations, in fulfilment of paragraphs 2 and 3 of its mandate.

The Drafting Group intends to submit a second report to the Negotiating Group concerning draft articles on the definition of investors and investments (paragraph 4 of its mandate) at the April 1996 meeting.

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I. Draft Articles on National Treatment, Most Favoured Nation Treatment, and Transparency

Article A

NATIONAL TREATMENT AND MOST FAVOURED NATION TREATMENT

1. *Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords [in like circumstances] to its own investors and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments.*
2. *Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment it accords [in like circumstances] to investors of any other Contracting Party or of a non-Contracting Party, and to the investments of investors of any other Contracting Party or of a non-Contracting Party, with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposition of investments.*
3. *Each Contracting Party shall accord to investors of another Contracting Party and to their investments the better of the treatment required by paragraphs 1 and 2, whichever is the more favourable to those investors or investments.*

Article B

TRANSPARENCY

1. *Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which may affect the operation of the Agreement. [Where a Contracting Party establishes policies which are not expressed in laws or regulations or by other means listed in this paragraph but which may affect the operation of the Agreement, that Contracting Party shall promptly publish them or otherwise make them publicly available].*
2. *Each Contracting Party shall promptly respond to specific questions and provide, upon request, information to other Contracting Parties on matters referred to in paragraph 1.*
- [3. *No Contracting Party shall be required to furnish or allow access to information concerning particular investors or investments the disclosure of which would impede law enforcement or would be contrary to its laws protecting confidentiality].*

COMMENTS

General

It was understood that the drafting of articles A and B was without prejudice to other aspects of the Agreement, including definitions, reservations, exceptions, standstill and rollback, and the role of the Parties Group.

Article A

1. While some delegations would have preferred separate articles on pre- and post-establishment, the majority of delegations felt that a single text would better capture the intended coverage of the agreement and avoid the difficult task of defining the boundary between pre- and post establishment. It was agreed, as a starting point, to work on the basis of a single text. Some delegations pointed to the links between a single text covering treatment of investors both pre- and post-establishment and the issues of definitions and the scope of the Agreement. Two delegations reserved their position pending the outcome of the discussion on these issues. The Group also felt that the scope of the commitments by individual countries could be identified by using precise language in any agreed reservations to National Treatment/MFN and perhaps by including references to relevant laws or regulations. The Group agreed that all diversification activities are covered by the references to “establishment, acquisition and expansion”.

2. “Including the words “in its territory” in paragraphs 1 and 2 was suggested for two reasons: *i)* to define the scope of application of national treatment and MFN; and *ii)* to provide an appropriate benchmark for assessing national treatment and MFN. Adding these words would make it clear that the Contracting Parties do not have obligations with regard to investors of another Contracting Party in a third country. One delegation suggested that a third reason for including “in its territory” would be to underline the need to avoid conflicting requirements on multinational enterprises. At the same time, however, it was important not to unduly limit the scope of the agreement, for example by excluding the international activities of established foreign investors and their investments. The place of this term in these paragraphs is still to be determined. It was also suggested that a solution might be found, as in NAFTA, in the article dealing with the scope of the Agreement. Whatever should be decided on this matter, it should be treated consistently throughout the Agreement.

3. Some delegations proposed the “same” or “comparable” treatment as the appropriate standard rather than “no less favourable” treatment. The purpose would be to prevent unlimited competition for international investment funds with consequential costs and distortions to investment flows. However, most delegations considered that this would unacceptably weaken the standard of treatment from the investor’s viewpoint. The question of investment “incentives” will be taken up later by the Negotiating Group.

4. Different views were expressed on the value of a “closed” or “open” list of investment activities to be covered by the National Treatment and MFN provisions, before and/or after establishment. A closed list had the advantage of certainty, but risked omitting elements that could be important to the investor. An open list would cover all possible investment activities, including new activities. But it could also create uncertainties as to the scope of the Agreement and might have adverse effects on the operation of existing bilateral and other investment agreements using a closed list. Several Delegations believed that the list “establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investments” should be considered a comprehensive one whose terms were intended to cover all activities of investors and their investments for both the pre- and post-establishment

phases. In their view, this was the preferable approach. It was also suggested that the term “sale or other disposition” should replace “disposal” in Article A2 of the draft articles on selected topics on Investment Protection [DAFFE/MAI/DG1(95)3]).

5. National treatment and MFN treatment are comparative terms. Some delegations believed that the terms for national treatment and MFN treatment implicitly provide the comparative context for determining whether a measure discriminates against foreign investors and their investments; they considered that the words “in like circumstances” were unnecessary and open to abuse. Other delegations believed that the comparative context should be spelled out and thus inclusion of the phrase “in like circumstances”. Examples of the inclusion of a specific reference are found in the NTI, some BITs and NAFTA. Examples of no specific reference are found in some other BITs and the ECT (although the United States and Canada made a Declaration concerning the term “in like circumstances”).

6. The question was asked whether the treatment accorded to foreign investors by a sub-federal state or province would meet the national treatment test only if it were no less favourable than the treatment accorded to the investors of the same state or province, or whether it would be sufficient to accord treatment no less favourable than that accorded to the investors from any other state or province. The question will need to be answered by the Negotiating Group in due course.

7. One delegation made a written proposal to refer, in the treatment of investors/investments article, to the concept of “equivalent competitive opportunities” analogous to that of GATS (Article XVII) [DAFFE/MAI/DG2/RD(96)1]. This was presented as a means of strengthening the national treatment provision by requiring that foreign investors and their investments have the opportunity to compete on terms equivalent to those enjoyed by domestic investors. This proposal was considered by some delegations to have positive elements particularly with respect to the treatment of branches of foreign financial institutions. “Equivalent treatment” was the basis of comparison, in the OECD Code of Liberalisation of Current Invisible Operations, between domestic financial institutions and branches, agencies, etc., of foreign financial institutions. Several delegations considered, however, that the introduction of the concept of “equivalent competitive opportunities” into Article A might create confusion on how to apply the national treatment and MFN obligations, and might even go beyond what these obligations were intended to cover. Other delegations suggested that issues concerning branches might be solved in the definition of “investments”.

8. As indicated by the Negotiating Group [DAFFE/MAI/M(95)2], Article A is intended to address any problem of *de facto* as well as *de jure* discrimination.

9. One delegation also suggested the addition of a distinct provision on “market access”, modelled on the GATS (Article XVI), to deal with situations where the same restrictions apply to both domestic and foreign investors. Such measures may include both quantitative restrictions (e.g. economic need tests or numerical quotas) and qualitative measures (e.g. restrictions on the legal form of the activities permitted in a given sector). It was considered that this subject raised issues outside the traditional domain of National Treatment and MFN and required prior discussion in the Negotiating Group.

10. Some delegations expressed the view that paragraph 3 was not strictly necessary since it does not add any substantive obligation to paragraphs 1 and 2. Paragraph 3 underlines, however, that, taken together, the purpose of paragraphs 1 and 2 is to give the investors and their investments the better of National Treatment and MFN.

Article B

1. Public dissemination of measures affecting foreign investment was considered essential to the operation of the MAI. Nevertheless a balance should be struck between this objective and the administrative burden of implementing it.
2. When sub-national, local or other authorities publish or otherwise make publicly available information on matters under their jurisdiction, this would be considered sufficient to meet the obligation of paragraph 1. There would be no obligation to duplicate this information at the federal or central government level.
3. The second sentence of paragraph 1 refers to situations in some countries where governments choose to establish policies that are not expressed in laws, regulations or other measures listed in this paragraph. However, as the legal standing and recourse to these policies varies among Member countries, it was agreed that they should be subject to transparency obligations only for governments which use this approach.
4. Regarding paragraph 2, a majority of delegations considered the establishment of specific enquiry points to be unnecessary. Other delegations considered that these enquiry points could contribute to the effective functioning of the MAI. They could also be useful to foreign investors by making available information of interest to them.
5. Paragraph 3 addresses the concerns that may arise with respect to the disclosure of information in the context of law enforcement or laws protecting confidentiality. Such concerns are addressed in other international agreements (GATS, Energy Charter, NAFTA). It was felt unnecessary, however, to add a reference to national security and public order since this issue would be addressed in the general exception article. Concern was nonetheless expressed that the existing text is insufficient to avoid disclosure of confidential business information. Another issue is whether this matter should be dealt with under the transparency article or in a separate article on "Special Formalities and Information Requirements" (see "New proposals" below).
6. The Group considered including a notification obligation along the following lines:

"Each Contracting Party shall notify the ("Parties Group") promptly, and in any case no later than 60 days after their entry into force, of any new measures or any changes to existing measures which significantly affect the performance of its obligations under the Agreement."
7. Such a provision could play a role in support of the possible activities of the Parties Group in connection with non-conforming measures subject to review and rollback, and general exceptions or any temporary derogations. It was agreed that this matter could be revisited once the MAI obligations in these areas had been clearly defined.
8. The Group noted the suggestion that any Contracting Party should be entitled to notify to the Contracting Parties Group any measure taken by any other Contracting Party which it considers affects the operations of the Agreement. This too may be relevant to the functions of the Parties Group.

New Proposals

1. One delegation, supported by other delegations, proposed the addition of a separate article on “Special Formalities and Information Requirements” which could read as follows :

“1. Nothing in Article A(1) shall be construed to prevent a Contracting Party from adopting or maintaining a measure that prescribes special formalities in connection with the establishment of investments by investors of another Contracting Party, such as a requirement that investors be residents of the Contracting Party, or that investments be legally constituted under the laws or regulations of the Contracting Party, provided that such formalities do not materially impair the protections afforded by a Contracting Party to investors of another Contracting Party and investments of investors of another Contracting Party pursuant to this Agreement.

2. Notwithstanding Articles A(1) or A(2), a Contracting Party may require an investor of another Contracting Party, or its investment, to provide routine information concerning that investment solely for information or statistical purposes. The Contracting Party shall protect such business information that is confidential from any disclosure that would prejudice the competitive position of the investor or the investment. Nothing in this paragraph shall be construed to prevent a Contracting Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.”

2. One delegation suggested that consideration be given to an article based on Article 5 (“Controls and Formalities”) of the OECD Codes of Liberalisation.

3. These issues merit further discussion.

II. Draft Article on General Exceptions

Article**

GENERAL EXCEPTIONS

- [1. This Article shall not apply to Articles** (on expropriation and compensation and protection from strife).]
2. Nothing in this Agreement shall be construed:
- a. to prevent any Contracting Party from taking any action [which it considers] necessary for the protection of its essential security interests [including those:]
 - (i) taken in time of war, [or] armed conflict, [or other emergency in international relations];
 - (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation [inter alia] of nuclear weapons or other nuclear explosive devices;
 - [(iii) relating to the production of arms and ammunition;]
 - b. to require any Contracting Party to furnish or allow access to any information the disclosure of which [it considers] [would be] contrary to its essential security interests;
 - c. to prevent any Contracting Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.
- [3. Nothing in this Agreement shall be construed to prevent any Contracting Party from taking any action necessary for the maintenance of public order.]
- [4. Paragraphs 2 and 3 may not be invoked by a Contracting Party as a means to evade its obligations under this Agreement.]
- [5. Actions taken pursuant to this Article shall be notified to the Parties Group in accordance with Article** of this Agreement.]
- [6. If a Contracting Party (the "requesting Party") has reason to believe that actions taken by another Contracting Party (the "other Party") are not in conformity with [Article] [paragraphs **], it may request consultations with that other Party. That other Party shall promptly enter into consultations with the requesting Party and shall provide information to the requesting Party regarding the actions taken and the reasons therefore.]

COMMENTS

Paragraph 1

1. It has been proposed that the general exceptions provisions not be applicable to all of the obligations under the agreement. The ECT (Article 24(1)) is an example of a multilateral agreement that does not allow for general exceptions to be taken with regard to specific obligations concerning compensation for losses or expropriation. Bilateral treaty practice differs on this matter. Some delegations thought that a reference to paragraph 2(c) would be necessary to clarify that actions pursuant to a UN Charter obligation would in any case prevail over the MAI (see paragraph 9, below). One delegation submitted a proposal which would have the same effect by changing the order of the paragraphs.

2. The question is whether certain obligations of the agreement are considered so central to investor protection, for example compensation in case of expropriation, that a provision should limit the right of a Contracting Party to invoke this Article for actions that would be inconsistent with its obligation to pay compensation in the case of an expropriation.

3. The majority view was that the MAI should provide an absolute guarantee that an investor will be compensated for an expropriated investment. This was questioned by one delegation which doubted that in time of war whether a country would be able to pay compensation, in all cases, to an investor of a party with which it is in conflict. In the case that general exceptions would be permitted to override MAI obligations, delegations might further consider whether this should be limited to only essential security interests.

4. One delegation raised the issue of the need to ensure that this provision would not apply retroactively. Delegations pointed to customary international law rules limiting retroactive application of treaties. They agreed this was a valid point, but that it applied more generally to the entire agreement and should be addressed elsewhere.

Paragraph 2

-- subparagraph a

5. One delegation, supported by other delegations, requested square brackets be put around the phrase "which it considers" in the chapeau, as well as brackets around the phrase "or other emergency in international relations" at the end of (i). In the opinion of these delegations, these proposals would help safeguard against potential abuse by constraining the self-judging nature of the provision and by limiting its scope. One delegation believes that, based on an ICJ decision, such a change would eliminate the self-judging nature of the provision.

6. There were different views on whether to delete the phrase "including those" in the chapeau, which would make the list a closed one. Recent agreements like the NAFTA, the ECT, the GATS, and the Shipbuilding agreement do not define essential security interests but provide elements clarifying the purpose of the provision. One delegation thought that in a closed list it would also be necessary to amend element (ii) (by inserting the phrase "inter alia" after the word "non-proliferation") to cover international non-proliferation agreements, other than those relating to nuclear weapons for example agreements concerning chemical weapons. One other delegation, supported by other delegations, proposed the inclusion of an additional element (iii).

-- subparagraph b

7. This provision is found in recent agreements (NAFTA, ECT, GATS, Shipbuilding). One delegation, supported by other delegations, requested that square brackets be put around the phrase "it considers" (to be replaced by "would be") to help safeguard against potential abuse by constraining the self-judging nature of the provision. One other delegation believes that, based on an ICJ decision, such a change would eliminate the self-judging nature of the provision.

8. Several delegations noted that this issue also arose in the context of the discussion on transparency in the National Treatment chapter. One delegation pointed out that in its opinion this paragraph would also apply to concerns relating to public order.

-- subparagraph c

9. Agreements such as the NAFTA, GATS, and the Shipbuilding agreement include a general exception provision relating to obligations for the maintenance of international peace and security. These provisions refer specifically to obligations under the UN Charter. Some delegations thought it unnecessary to refer to this obligation because the supremacy of the UN Charter over international treaties is not disputed, but they agreed not to insist on its deletion if others wanted to make this explicit. Others were of the opinion that this reference was too restrictive because it might not cover actions taken pursuant to regional security arrangements. To address this point, one delegation proposed including, after the words "UN Charter", the phrase "or equivalent arrangements authorised by a competent international organisation". One other delegation saw this as an issue of clarification rather than one of restrictiveness and suggested including, after the word "under", the phrase "or consistent with".

Paragraph 3

10. Some countries believe that a reference to public order is necessary to allow countries to take exceptional measures based on this principle. One delegation indicated in a written submission [DAFFE/MAI/DG2/RD(96)2] that a public order clause was meant to ensure certain objectives, including the non-discriminatory application of its laws and the prevention of disturbances to the public order that could be posed by certain foreign investments. It thought that given the different circumstances of foreign and domestic investors as concerns the protection of public order, it would not be possible, in all cases, to accord equivalent treatment to these different types of investors. Delegations recognised the interest of a state in ensuring the application of its criminal laws, anti-terrorist measures, and money laundering regulations, for example. But not all delegations were convinced that it is necessary to discriminate between foreign and domestic investors in order to protect public order. One delegation remarked that if the MAI went beyond national treatment obligations to include the concept of market access, then the broader interpretation of public order would be necessary.

11. Several delegations were of the opinion that provision might need to be made for cases where information requirements or other formalities might be required of foreign investors because they are not in the same situation as domestic investors. This question also arose in the context of the discussion of the transfer provisions in the investment protection chapter where the host state would want to preserve its right to require certain reports without being in contradiction of the absolute right of free transfer otherwise provided by the agreement. Article 1111 of the NAFTA was cited as a possible model to take account of these situations. The question arose whether in fact this was not a matter of "equivalent treatment" which could be included in the context of national treatment.

12. In situations where the state needs to ensure that all investors conform to its laws and regulations which are not in contradiction with the provisions of the agreement, a provision of more general application might also be needed, as in Article 5 of the Capital Movements Code. The Group could consider a provision similar to that in the Code which would apply to the whole of the agreement. If this were the preferred solution, it might obviate the need for a special provision in the transfer article or elsewhere in the agreement where there might be similar concerns.

13. Several proposals were made with the intent to narrow the scope of a public order exception. One delegation proposed limiting the public order concept to exceptions to the national treatment principle and to make the MAI dispute settlement mechanism applicable. One other delegation remarked, however, that if the MAI went beyond national treatment obligations to include the concept of market access, then the broader interpretation of public order would still be necessary. One delegation suggested a reference to the ECJ principles of proportionality and the exclusion of economic purposes as additional limitative qualifications to public order

14. Delegations in favour of including a public order exception agreed that its use should be strictly controlled. These delegations felt that the actions relating to public order would not be self-judging and would be subject to the limitation in paragraph 4 and to the procedures in paragraph 6. One delegation, supported by another one, stated that these limitations and procedures should apply in the same way to other general exceptions and that all general exceptions should be treated in the same way in relation to the applicability of the dispute settlement mechanism.

Paragraph 4

15. Paragraph 4 would apply to all exceptions in this article. It is another way of formulating the obligation that parties must be in good faith when invoking this article and cannot avail themselves of it as a pretext for not complying with their obligations under the agreement. A good faith obligation already exists in international law and one delegation has concerns that by restating it in the agreement, we may create a different standard. Some delegations thought it might be useful to follow the ECT (Article 24) and GATS (Article XIV) provisos that public order or other general exceptions must not constitute a disguised restriction or that they are invoked without proper justification. This paragraph could be considered to have the effect of allowing a party which had reason to believe that another party had made improper use of this article to challenge such use as contrary to the objectives of the article. A decision on paragraph 4, in the opinion of several delegations, would have to wait until such time that consideration of paragraphs 2 and 3 had been completed.

Paragraph 5

16. The content of this paragraph would need to await a discussion of the role of a "Parties Group". The requirement to notify measures is intended to facilitate transparency and to promote consistency in the manner that MAI Parties might apply the general exceptions provisions. Some delegations thought that the 1991 clarification by the CIME that "measures taken for economic, cultural or other reasons should be identified as such and should not be shielded by an excessively broad interpretation of public order and essential security interests..", might also assist the Parties in applying these provisions.

Paragraph 6

17. Most delegations were in favour of providing for a mechanism for consultation/dispute settlement. It would be understood that entering into consultations would not prejudice the right of either Party to invoke the other procedures of the agreement to which it might be entitled. The question remains whether paragraph 4 provides an objective standard which, if violated, can give rise to an actionable cause.

18. Paragraph 6 could be adapted depending on how parties wish to proceed. There are several options which can be considered:

a) actions relating to any of the provisions of this article could be subject to consultations (as provided for in the article or by reference to the consultations procedures of the agreement), and to the dispute settlement provisions of the agreement to the extent that the provisions are not entirely self-judging;

b) actions relating to any of the provisions of this article could be subject to consultations (as provided for in this article or by reference to the consultations procedures of the agreement), to the exclusion of recourse to the dispute settlement provisions of the agreement;

c) actions relating to the public order provisions of paragraph 3, could be subject to consultations (as provided for in this article or by reference to the consultations procedures of the agreement), and to the dispute settlement provisions of the agreement.

19. In the view of one delegation, any dispute settlement mechanism provided in the MAI would be rendered superfluous by the self-judging nature of the general exception provisions. This delegation also questioned whether it would be necessary to provide a specific consultation mechanism in this article separate from the general consultation mechanism of the MAI.

20. Whatever the procedure agreed for general exceptions, it will have to be considered in the context of the MAI provisions on the role of the Parties Group and the dispute settlement procedures.

III. Proposals for Mechanisms for Standstill, Rollback and Listing of Country Specific Reservations

A. General observations

1. The MAI is to be a comprehensive agreement setting high standards of liberalisation and protection for international investors and their investments in all sectors of economic activity. Given its high standards and broad coverage, however, the MAI is expected 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 achieving standstill, rollback and the listing of country specific reservations. The present note describes the proposals of the Drafting Group on these subjects. The Group has not considered, however, how these proposals would apply to “special topics”, including demonopolisation and privatisation.

2. These proposals are without prejudice to the results of the negotiations on the nature and scope of the MAI obligations, the extent of the Contracting Parties’ reservations to these obligations and the overall balance of commitments.

B. Standstill and the listing of country specific reservations

3. The MAI aims to ensure a high minimum standard of treatment for investors and their investments, including National Treatment and MFN treatment. Standstill would result from the prohibition of new or more restrictive exceptions to this minimum standard of treatment. From this perspective, a violation of standstill would be a violation of the underlying MAI obligations (e.g. of National Treatment and MFN), and the dispute settlement provisions would apply to such breaches of the MAI obligations.

4. Standstill 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. For those matters where Contracting Parties are ready to commit to standstill, the Drafting Group considered that:

- a) each Contracting Party should 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
- d) an amendment to a non-conforming measure would be permitted provided it did not decrease the conformity of the measure.

Of course, if the MAI obligations were expanded, paragraph 5a) - d) would come into play again with respect to the new or enlarged obligations.

6. The Drafting Group considered that further discussion is needed on the question of country specific reservations in certain sensitive sectors and new economic activities that may emerge in the future. Some delegations suggested flexibility could be achieved by separate annexes to the Agreement for the listing of country specific reservations in these areas.

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

8. For practical reasons, however, the amount of information to be provided should be limited to the minimum necessary to describe the non-conforming measures. This may be particularly relevant to sub-national (e.g. state and local) measures, not all of which may merit listing.

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

10. 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 through periodic examinations of Member countries' restrictions has been the approach of the OECD liberalisation instruments. 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.

11. Rollback 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.

12. 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).
- 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, or on an horizontal or sectoral basis, taking into account the degree of liberalisation already achieved; and
- c) future rounds of negotiations designed to remove non-conforming measures. The decision to launch future negotiations could be taken at the conclusion of the MAI negotiations or the MAI could provide a specific date for the first round of such negotiations.

13. A “Parties Group” could have the role of monitoring the adjustment of country reservations, conducting periodic examinations of non-conforming measures or launching future rounds of negotiations.