



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Drafting Group No.3 on Definition, Treatment and Protection of Investors and Investments

DRAFT ARTICLE ON THE LODGING OF COUNTRY SPECIFIC RESERVATIONS

(Note by the Chairman)

Draft Article on the Lodging of Country Specific Reservations

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I Draft Article on Lodging of Country specific reservations¹

A.² Articles X (National Treatment), Y (Most Favoured Nation Treatment), [Article Z,..., ... and Article ...], do not apply to:

- (a) any existing non-conforming measure that is maintained by a Contracting Party as set out in its Schedule to Annex A of the Agreement;
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles X (National Treatment), Article Y (Most Favoured Nation), [Article Z, ..., and Article ...].

[B.³ Articles X; Y, [Article Z,...,and Article ...] do not apply to any measure that a Contracting Party [adopts] or [maintains] with respect to sectors, subsectors or activities, as set out in its Schedule to Annex B of the Agreement.]

[C.⁴ No Contracting Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to [Annex A or] Annex B⁵, require an investor of another Contracting Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.]

Definition of “Measure”

Measure includes any law, regulation, procedure or administrative ruling or judicial decision of general application, or international agreement.

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1. It has been agreed that the disciplines listed in the chapeau text of parts A and B should remain incomplete for the time being pending political decisions by the Negotiating Group.
 2. It is agreed that part A of the draft article is needed as the core provision to “grandfather” existing non-conforming measures and prevent the introduction of more restrictive measures (“standstill”).
 3. There are different views with respect to part B of the draft article which would allow new non-conforming measures to be introduced after the Agreement comes into force. One view is that such a provision might undermine the MAI disciplines to which it applied. The opposite view is that part B would make it easier to preserve high standards in the disciplines of the agreement by allowing flexibility to countries in lodging their reservations.
 4. The Drafting Group has been requested in April to examine a provision along the lines of Article 1108.4 of NAFTA (Reservations and Exceptions) to ensure the protection of existing investments in the event they had been established under conditions more favourable than those guaranteed by the reservations of the country concerned. Part C is based on this language which reads as follows:
“No Party may, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.”
 5. It is clear that part C concerns non-conforming measures referred to in part B. The question arises as to whether part C is also applicable to non-conforming measures referred to in part A.

II. Introduction to Annex A [and Annex B] of the Agreement listing country-specific reservations⁶

1. *The Schedule of a Contracting Party sets out, pursuant to Article ...[on the lodging of country specific reservations], the reservations taken by that Party with respect to existing measures that do not conform with obligations imposed by:*

- (a) Article X (National Treatment),*
- (b) Article Y (Most-Favoured-Nation Treatment),*
- (c) Article Z (...), or*
- (...) Article (...).*

[and, in certain cases, sets out commitments for future liberalisation.]

2. *Each reservation sets out the following elements:*

- (a) **Sector** refers to the general sector in which the reservation is taken;*
- (b) **Sub-Sector** refers to the specific sector in which the reservation is taken;*
- (c) **Obligation** specifies the MAI article referred to in paragraph 1 for which a reservation is taken;*
- (d) **Level of Government** indicates the level of government maintaining the measure for which a reservation is taken;*
- (e) **Legal source or authority of the measure** identifies the specific law, regulation, administrative decision or international agreement, and part thereof, for which a reservation is taken;*

6. The following format has been followed by delegations for submitting their initial lists of country specific reservations [DAFFE/MAI/RES(97)31]:

“Sector:

Sub-Sector:

Obligation or MAI article in respect of which the Reservation is taken:

Level of Government:

Legal source or authority of the Measure:

Succinct Description of the Measure:

Motivation or purpose of the measure:”

(f) **Succinct Description of the Measure** sets out non-conforming aspects of the existing measures for which the reservation is taken, [together with commitments for future liberalisation, if any,] and

(g) **Motivation or purpose** describes the rationale for a given measure.

3. In the interpretation of a reservation, all the above elements shall be considered. In the event of a discrepancy between the non-conformity of the measure as set out in the legal source or authority identified and the non-conformity as described in the other elements, the reservation shall be deemed to apply to the non-conformity of the measure as set out in the legal source or authority [to the extent that the resulting non-conformity does not substantially and materially exceed the scope of the non-conformity as set out in the other elements].

COMMENTARY

I. Draft Article on the lodging of country specific reservations

1. The draft article should be examined in conjunction with the proposed introduction to Annex A [and Annex B] of the Agreement and the standard presentation suggested for the lodging of country specific reservations (reproduced in footnote 6). These three elements combined provide the methodology for lodging country specific reservations under the MAI.

2. Subparagraphs a) and c) in part A of the draft article were broadly acceptable to most delegations on a first reading. Subparagraph b) also attracted support, although some delegations questioned the need to provide for the possibility that Parliaments might fail to renew laws immediately.

3. Questions have been raised about whether the provisions of the draft article, especially part A, could be applied uniformly to all levels of government and regional economic integration organisations. *Delegations could submit amendments to the present text to address these questions. Alternatively, the text could be reviewed after negotiators have decided how measures by sub-national entities and regional economic integration organisation should be treated across the MAI.*

4. The proposed definition of the term “**Measure**” draws on the language used in GATS⁷, NAFTA⁸ and the transparency article in the MAI [see Consolidated Text and Commentary, DAF/MAI(97)1/REV2, page 11] in an attempt to ensure consistency with these agreements.

5. The draft Article currently uses the term “reservations.” Under treaty law, “reservations” normally have reciprocal effect unless otherwise specified. In the OECD Codes of Liberalisation, which use the term “reservations”, a specific provision is included, Article 8, by virtue of which properly maintained Code reservations do not have reciprocal effect. The OECD National Treatment Instrument uses the term “exceptions” for such matters. The suggestion had been made to use “exceptions” in this draft Article of the MAI.

II. Introduction to Annex A [and Annex B] of the Agreement listing country-specific reservations for reservations on existing measures

6. This draft introduction to Annex A [and Annex B] is intended to respond to the suggestions made by delegations in April [DAFFE/MAI/DG3(97)8, section III]. In particular, it attempts to define the key terms used for describing the nature and scope of a reservation in accordance with the suggested standard presentation for country reservations (see footnote 6). It draws on the language of the four introductory paragraphs of Annex 1 to NAFTA since these paragraphs were the focal point for most of the comments made by delegations on definitional issues.

7. GATS Article XXVIII defines a measure as follows:

“Measure means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form” .

8. Under article 201 of NAFTA, a “Measure includes any law, regulation, procedure, requirement or practice”.

7. The question was raised as to whether national law or the description of the measure should define the limits of the Contracting Parties' obligations under the MAI. The need for certainty was stressed in this connection. Paragraph 3 above is an attempt to address this, inspired by the NAFTA approach but adopting somewhat modified language. Delegations are invited to provide views on this issue.