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**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 MODIFICATION OF COUNTRY  
RESERVATION SCHEDULES**

**(Note by the Chairman)**

## DRAFT ARTICLE ON MODIFICATION OF COUNTRY RESERVATION SCHEDULES

### (Note by the Chairman)

1. At the conclusion of the last Negotiating Group discussion on Liberalisation and the Lodging of Country Specific Reservations, the Chairman *“noted that almost all delegations could accept the principle of standstill as a basic working hypothesis and that reservations should have a juridical base. Some deviation from standstill will almost certainly be necessary, particularly for some of the special topics. The article dealing with the lodging of reservations would, in all likelihood, need to provide for that possibility. The deviations from standstill should nevertheless be narrow and precisely circumscribed in the reservations. It would be helpful to look at GATS article XXI on Modification of Schedules which allows the introduction of new restrictions provided there is adequate compensation.”* [DAFFE/MAI/M(97)6, item 3].
2. The Annex to the present document contains, for illustrative purposes, a draft article for the MAI on Modification of Country Reservation Schedules adapted from Article XXI of GATS (attached).
3. Delegations could have a general discussion on the implications of such annexed draft article for an investment agreement such as the MAI, taking into account the draft article on the lodging of country specific reservations [see proposed draft in DAFFE/MAI/DG3(97)12].
4. The Commentary which accompanies the attached draft article raises a number of questions for possible consideration by the Drafting Group, including in connection with the dispute settlement provisions of the MAI.

## *Annex I*

### **DRAFT ARTICLE ON MODIFICATION OF COUNTRY RESERVATION SCHEDULES**

1.
  - (a) *A Contracting Party may modify or add to its Schedule of reservations to Annex A of the Agreement<sup>1</sup>, at any time after [three] years have elapsed from the date on which that Schedule of reservations entered into force, in accordance with the provisions of this Article.*
  - (b) *A Contracting Party shall notify its intent to modify or add to its Schedule of reservations pursuant to this Article to the Parties Group no later than [three] months before the intended date of implementation of the modification or addition.*
2.
  - (a) *At the request of any Contracting Party the benefits of which under this Agreement may be affected by a proposed modification or addition notified under subparagraph 1(b), the modifying Contracting Party shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Contracting Parties concerned shall endeavour to maintain a general level of mutually advantageous treatment of investors and their investments no less favourable than that provided for in Schedules of Reservations prior to such negotiations.*
  - (b) *Compensatory adjustments shall be made on a most-favoured-nation basis.*
3.
  - (a) *If agreement is not reached between the modifying Contracting Party and any affected Contracting Party before the end of the period provided for negotiations, such affected Contracting Party may refer the matter to arbitration in accordance with the procedures set out in Articles ... of the Agreement<sup>2</sup>. Any Contracting Party that wishes to enforce a right that it may have to compensation must participate in the arbitration.*
  - (b) *If no affected Contracting Party has requested arbitration, the modifying Contracting Party shall be free to implement the proposed modification or addition.*
4. *The modifying Contracting Party may not modify or add to its Schedule of reservations until it has made compensatory adjustments in conformity with the findings of the arbitration and complied with the terms of any agreement reached under paragraph 2.*
5. *The [Parties Group] shall establish procedures for rectification or modification of Schedules of reservations.*

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1 See draft article on the lodging of country specific reservations in DAFFE/MAI/DG3(97)12.

2 These articles refer to the state-to-state dispute settlement procedures of the MAI.

## COMMENTARY

1. Under the GATS, the possibility for modifying or withdrawing a given country commitment is provided only after *three* years have elapsed from the date on which that commitment entered into force. Should a similar time limit be imposed on a Contracting Party of the MAI in paragraph 1 of the article with respect to a modification or addition to its schedule of reservations or should this possibility be available as soon as the MAI enters into force?

2. GATS article XXI contains a *notification* requirement of *three* months before the intended date of implementation of a particular modification of a schedule or the withdrawal of a commitment by a member country. This is in addition to the notification requirement found in the Transparency article of the GATS (Article III)<sup>3</sup>. Should the MAI contain a similar time limit for notifying a modification or addition to a country schedule, that could be recorded in paragraph 1(b) of the proposed draft article, or should a different deadline be contemplated? Should such a notification requirement be additional to or separate from any notification requirement provided under the Transparency article of the MAI?<sup>4</sup>

3. Reaching agreement on any necessary compensatory adjustment (paragraph 2) is undoubtedly a crucial aspect of the proposed procedure for the modification of a country schedule. Article XXI of GATS does not specify the nature of the compensation or on how it should be calculated. These matters are left for negotiation between the “modifying Member” and affected Member(s), at least at the initial stage of the process. Delegations may accordingly offer views as to whether the concept of compensation should be defined or circumscribed in some way.

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3. Article III of GATS reads as follows:

“Each member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes of existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.”

4. It may be recalled that the Drafting Group has considered a notification obligation under the following lines:

“Each Contracting Party shall notify (the “Parties Group”) promptly, any 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. “

It was recognised that such a provision could play a role in support of possible activities of the Parties 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 have been clearly defined [see Consolidated Text and Commentary DAF/MAI(97)1/REV2].

4. Delegations may wish to pay particular attention to the dispute settlement procedures outlined in the draft article, notably with respect to arbitration, to ensure consistency with the dispute settlement procedures envisaged for the whole of the MAI [see Consolidated Text and Commentary DAF/MAI(97)1/REV2]<sup>5</sup> The annexed draft article does not include a paragraph along the lines of GATS article XXI 4(b)<sup>6</sup> concerning the *modification or withdrawal of substantially equivalent benefits*. This matter is under discussion in the informal group on dispute settlement and delegations may consider it preferable to await the outcome of that discussion. Another important question which does not arise under the WTO dispute settlement mechanism (which is limited to state-to-state disputes) is whether the investor-to-state dispute settlement procedures of the MAI could be invoked in the context of a modification of a country specific reservation.

5. All legal issues raised in this note could also be referred to the informal group on dispute settlement for advice.

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5. Article XXI of GATS does not contain any specific cross-reference to the WTO dispute settlement procedures but Articles XXII (Consultations) and XXIII (Dispute Settlement and Enforcement) make it clear that a Member may have recourse to the Dispute Settlement Understanding (DSU) of the WTO to enforce any rights under this Agreement.

6. Article XXI 4(b) of GATS reads:

*“If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings. Notwithstanding Article II (Most Favoured Nation Treatment), such a modification or withdrawal may be implemented solely with respect to the modifying Member .”*

## *Annex 2*

### **Article XXI of the GATS**

#### *Modification of Schedules*

1. (a) A Member (referred to in this Article as the "modifying Member") may modify or withdraw any commitment in its Schedule, at any time after three years have elapsed from the date on which that commitment entered into force, in accordance with the provisions of this Article.  
  
(b) A modifying Member shall notify its intent to modify or withdraw a commitment pursuant to this Article to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal.
2. (a) At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an "affected Member") by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.  
  
(b) Compensatory adjustments shall be made on a most-favoured-nation basis.
3. (a) If agreement is not reached between the modifying Member and any affected Member before the end of the period provided for negotiations, such affected Member may refer the matter to arbitration. Any affected Member that wishes to enforce a right that it may have to compensation must participate in the arbitration.  
  
(b) If no affected Member has requested arbitration, the modifying Member shall be free to implement the proposed modification or withdrawal.
4. (a) The modifying Member may not modify or withdraw its commitment until it has made compensatory adjustments in conformity with the findings of the arbitration.  
  
(b) If the modifying Member implements its proposed modification or withdrawal and does not comply with the findings of the arbitration, any affected Member that participated in the arbitration may modify or withdraw substantially equivalent benefits in conformity with those findings. Notwithstanding Article II, such a modification or withdrawal may be implemented solely with respect to the modifying Member.
5. The Council for Trade in Services shall establish procedures for rectification or modification of Schedules. Any Member which has modified or withdrawn scheduled commitments under this Article shall modify its Schedule according to such procedures.