



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
(SELECTED OUTSTANDING ISSUES)**

(Note by the Chairman)

**DRAFT ARTICLE ON LODGING OF COUNTRY SPECIFIC EXCEPTIONS
(SELECTED OUTSTANDING ISSUES)**

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I. Introduction

1. At the conclusion of the October meeting, delegations were invited to reflect upon two related issues: *a)* how the draft article on the lodging of country specific exceptions should be modified to ensure that a reduction in the non-conformity of a measure listed in Schedule A to Annex A of the Agreement shall become effective, for the purpose of the MAI, upon its entry into force in the country concerned, irrespective of the description made of the non-conformity of the measure in the country schedule; and *b)* the merits of a notification obligation(s) for changes in the non-conformity of measures and their translation into the text of Schedule A to Annex A of the Agreement. Another outstanding issue was whether Part C is applicable to the non-conforming measures referred to in Part A of the draft article on the lodging of country specific exceptions. The following note present ways of addressing these issues, for consideration by the Group at its upcoming meeting in December.

II. Ratchet effect of Article A

2. It is agreed that foreign investors and their investments should benefit from any liberalisation measure by the Contracting Parties as soon as the relevant law, regulation or practice ... enters into force. In other words, the ratchet effect in Article A should take effect as soon as such new law, regulation, rule, decision is enforceable under the domestic legal system. There are two drafting proposals on the table to achieve this result:

The bracketed text in draft article A(a) in DAFPE/MAI/DG3(97)15 and more particularly the bolded text which reads:

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

(a) any existing non-conforming measure, [as set out by a Contracting Party in its Schedule to Annex A of the Agreement, **to the extent that the measure is maintained**]”; and

The bolded proposal by one delegation for the same subparagraph (a):

“(a) any existing non-conforming measure, as set out by a Contracting Party in its Schedule to Annex A of the Agreement, **to the extent that the measure is maintained in its legal system;**”

3. Drawing on NAFTA, it would appear, however, that the same objective could be fulfilled by amending the language of the “legal source or authority of the measure” element of an exception in the Introduction to Annex A of the Agreement, which currently appears in section B of DAFPE/MAI/DG3(97)15, in the following way:

“2. Each exception sets out the following element:

...

(e) Legal source or authority of the measure identifies the specific legal source of the exception, whether in the form of a law, regulation, rule, decision, or any other form as of the date of entry into force of the Agreement, or as continued, renewed or amended after that date

...”

4. The bolded language (and particularly the terms “continued, renewed or amended”) parallels the terms used in Part A (a), (b) and (c) of the draft article on the lodging of country specific exceptions. This addition would make it clear that the legal source or authority which commits a Contracting Party under any given exception appearing in Schedule A is the relevant law or legal authority in force in the country concerned and not necessarily the law or authority identified in that Schedule. This means that any change in the non-conformity of a measure resulting from a change in the law or legal authority pertinent to such measure -- which, under List A, could only entail as a reduction in the non-conformity of the measure -- shall automatically constitute the legal basis for the Contracting Party obligations, irrespective of whether the Contracting Party’s entry in Schedule A has been modified to reflect the change in question.

5. This bolded language is also consistent with the underlying principle of interpretation proposed in paragraph 3 of the introduction of Annex A which foresees that the legal source or authority shall always prevail when it involves a higher level of liberalisation than the “description of the measure” element of the exception .

Question:

-- **Which of the options outlined above could the Group recommend to the Negotiating Group to ensure an effective and automatic implementation of the ratchet effect built-in “List A” non-conforming measures?**

III. Notification

6. There is general agreement that notification of a reduction in the non-conformity of a measure would not be necessary for its effective implementation under the MAI. Notification is a matter of transparency and should be addressed separately. Several delegations consider, however, that the MAI should contain notification obligations in addition to the obligations contained in the General Transparency Article (DAFFE/MAI(97)1/REV2, section II). Three different situations were examined.

i) Rectifications or modifications of Schedule A of a purely formal or minor nature

7. One delegation proposes the following notification provision for rectifications or modifications of a country schedule of purely formal or minor nature based the Government Procurement Agreement:

“Rectifications or modifications relating to Annex ..., along with information of the likely circumstances of the change shall be notified. If the rectifications or modifications are of purely formal or minor nature, they shall become effective provided there is no objection within 30 days.”

8. A majority of delegations consider, however, that such language is not needed since, according to article 79 of the Vienna Convention (Corrections of errors in texts or certified copies of treaties), rectifications of errors in a Contracting Party exception could be made through the intermediation of the Depository of the MAI which in case of doubt could bring any potential problem to the attention of Contracting Parties. The legal expert from one delegation considers, however, that this procedure would not cover a modification of schedule of a formal or minor nature resulting from a technical change in domestic legislation after the entry into force of the MAI. It would be preferable, for transparency purposes, to notify these changes to the Contracting Parties and enter them under paragraph (c) of Part A.

Question:

- **Are delegations of the view that the MAI should rely of the practice followed under article 79 of the Vienna Convention and do away with the need of a notification obligation for rectifications or modifications of Schedule A of a purely formal or minor nature?**

ii) Errors or omissions made in good faith

9. One delegation proposes the following provision for the notification errors or omissions made in good faith:

“Modifications made to take care of errors or omissions made in good faith relating to Annex ..., along with information about the likely circumstances of the change, shall be notified to the Parties Group and shall become effective provided there is no objection within 30 days after their notification.”

Question

- **Are delegations prepared to recommend the inclusion of the above provision into the MAI?**

iii) Modification in the non-conformity of a measure

10. Several delegations are of the view a notification requirement for modification in the non-conformity of a measure will enhance the effectiveness of the whole article on the lodging of country specific exceptions, particularly with respect to “List A” measures. This discussion has been based on the text in page 108 of the Consolidated Text and Commentary [DAFFE/MAI(97)1/REV2] :

“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 change in the non-conformity of its measures with obligations under the Agreement, including the motivation or purpose of the change.”

11. Some delegations feel that this text could be improved in a number of ways (for instance by referring to “prompt” notification or “immediate” notification). Other delegations feel that the transparency requirements should not go beyond those provided for in the Transparency article of the MAI.

12. One delegation has brought to the Group's attention the issue of how to relate a Contracting Party's notification to a modification of its Schedule to the Agreement. One delegation proposes the following paragraph (d) to Article A as a possible solution to this issue:

“(d) A Contracting Party shall notify a change to its Schedule to Annex A of the Agreement to reflect any changes to the non-conformity of measures as provided for in paragraph (c) above.”

13. It can be noted that both the OECD instruments (the Codes of Liberalisation and the National Treatment instrument) and the GATS contain a notification obligation with respect to the adoption of new measures which reads as follows:

Under the Codes(Article 11 a)

“Members shall notify the Organisation, within the periods which the latter may determine, of the measures of liberalisation which they have taken and of any other measures which have a bearing on this Code, as well of any modifications of such measures.

....

The Organisation shall consider the notification submitted to it in accordance with the provisions of paragraph (a)... with a view to determining whether each Member is complying with its obligations under this Code”

Under the National treatment instrument (Article 1)

“(a) Members shall notify the Organisation, of all measures constituting exceptions to the National Treatment within 60 days of their adoption and of any other measures which have a bearing on National Treatment. All exceptions shall be set out in Annex A to this Decision.

(b) Members shall notify the Organisation within 60 days of their introduction of any modifications of the measures covered in paragraph (a).

(c) The Organisation shall consider the notifications submitted to it in accordance with the provisions of paragraphs (a) and (b) with a view to determining whether each Member is meeting its commitments under the Declaration.”

Under the GATS (Article III)

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

...

5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.”

14. The approach followed under the OECD instruments and the GATS seems to combine notification requirements with respect to all the situations considered above (rectifications or

modifications of Schedule A of a purely formal or minor nature, errors or omissions made in good faith, and reductions in the non-conformity of measures). It would also involve a role for the Parties Group.

Question:

- **Do delegations have any preference for any combination of the above approaches and if so which ones?**

IV. *Applicability of Part C*

15. It is clear that Part C of the draft article on the lodging of country specific reservations concerns non-conforming measures referred to in Part B. The question arises as to whether Part C is applicable to non-conforming measures referred to in Part A.

16. It is understood that the aim of Part C is to protect existing rights of foreign investors against discriminatory treatment resulting from measures permitted under Part B (and Part A). This situation is different from that of expropriation of assets of established enterprises which is addressed in the expropriation chapter of the MAI. Favourable reaction to the proposed wording does not prejudice acceptance of Part B, however. One delegation can accept Part C subject to an interpretative note which would read as follows:

“A Contracting Party may, under this Article, take steps that seek to ensure compliance with any measure notified under Annex A or Annex B. Any such action shall not be taken as reducing the conformity of the measure notified in Annex A or Annex B.”

Question:

- **What recommendation is the Group prepared to make with respect to the coverage of Part C of the draft article on the lodging of country specific reservations?**