



Negotiating Group on the Multilateral Agreement on Investment (MAI)

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

REPORT TO THE NEGOTIATING GROUP

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I am pleased to submit the attached report which presents the results of DG3 discussions on the subjects of Lodging Country Specific Exceptions and Labour and Environment (Preamble), held on 4 December 1997.

With regard to the issue of notification and rectification of country exceptions, the Group submits in footnote 7 three policy issues for consideration by the Negotiating Group.

Chairman

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I. DRAFT ARTICLE ON LODGING OF COUNTRY SPECIFIC EXCEPTIONS

A) *Draft article on lodging of country specific exceptions*¹

Text²

A.³ *Articles X (National Treatment), Y (Most Favoured Nation Treatment), [Article Z, ..., ... and Article ...],⁴ 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, continued or promptly renewed in its legal system;⁵*

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1. It is generally agreed to replace the term “reservations” by the term “exceptions”. Under treaty law, “reservations” normally have reciprocal effect unless otherwise specified. This is clearly not intended to be the case with respect to Country Schedules. Any possible confusion with general exceptions could be taken care of by the qualification “country-specific”. The use of the term “exception” would not prevent the listing of a measure with a reciprocity requirement. It would help avoid confusion in the case of any genuine “reservations” if the treaty law sense were to be made and called such. One country maintains a scrutiny reserve on this change.
 2. The draft article to address existing measures should be examined in conjunction with the proposed introduction to Annex A of the Agreement and the standard presentation suggested for the lodging of country specific reservations (reproduced in footnote 11). These three elements combined provide the methodology for lodging country specific reservations under the MAI.
 3. 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”).
 4. It is agreed that the disciplines listed in the chapeau text of parts A and B of the draft Article should remain incomplete for the time being pending political decisions by the Negotiating Group. The text could also be reviewed after negotiators have decided how measures by sub-national entities and regional economic integration organisations should be treated across the MAI.
 5. All delegations agree that foreign investors should benefit from any liberalisation measure as soon as the relevant law, regulation or practice ... enters into force. To make this clear, it is proposed to insert the words “continued or promptly renewed in its legal system” at the end of the sentence. Two countries have a scrutiny reserve on this addition.

- (b) *an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not increase the non-conformity⁶ of the measure, as it existed immediately before the amendment, with Articles X (National Treatment), Article Y (Most Favoured Nation), [Article Z, ..., and Article ...].⁷*

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6. It is agreed to replace the words “decrease the conformity” with the words “increase the non-conformity”.
7. Delegations agree that notification of a reduction in the non-conformity of a measure would not be necessary for its effective application under the MAI. Notification is a matter of transparency and should be addressed separately.

It is agreed that article 79 of the Vienna Convention concerning Corrections of Errors in texts or Certified Copies of Treaties would do away with the need of a notification obligation for rectifications of errors.

Delegations identified three policy issues for consideration by the Negotiating Group:

- a) First, whether there is a need for a notification obligation for modifications in the non-conformity of measures.

Some delegations consider that a mandatory notification obligation for changes in country exceptions lists would be too cumbersome. Update of the country lists could be a result of a possible review mechanism. Some other delegations consider that it would be highly desirable to ensure that country lists of exceptions are kept up to date as this would enhance the usefulness of the MAI for foreign investors. This could, according to some delegations, be done at regular intervals (for instance once a year).

The Group recalls in this context by way of illustration the following proposal in page 108 the Consolidated Text and Commentary [DAFFE/MAI(97)1/REV1]:

“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.”

- b) Second, whether such notification obligation would have implications for the role of the Parties Group and, if so, what should be the role of the Parties Group on this regard; and
- c) Third, whether it would be allowed to rectify errors or omissions made in good faith. Delegations note the following proposal made by one country to address this issue:

“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.”

At the end of the discussion, the Group notes the technical issue raised by another country on how to relate a Contracting Party’s notification to a modification of its Schedule to the Agreement. It also notes the proposal of a third country for a possible solution to this issue.

“(c) 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 (b) above.”

[B.⁸ 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. 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 B⁹, 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.]

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8. 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.
 9. It is agreed that Part C is applicable only to non-conforming measures referred to in Part B. The objective of Part C is to protect existing rights of foreign investors against discriminatory treatment resulting from measures permitted under Part B. This situation is different from that of expropriation of assets of established enterprises which is addressed in the expropriation chapter of the MAI. This favourable reaction to the proposed wording does not prejudice acceptance of Part B, however. One country 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.”

B) Introduction to Annex A¹⁰ of the Agreement listing country-specific exceptions¹¹

1. The Schedule of a Contracting Party sets out, pursuant to Article ... [on the lodging of country specific exceptions], the exceptions 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 (...).

together with any commitment to eliminate or reduce the non-conformity of any of the measures.¹²

10. It was agreed to withhold the drafting of the introduction of “Annex B” until the Negotiating Group had taken a political decision on the status and coverage of Part B of the Article. Moreover, a number of delegations felt that the wording of such introduction might need to be drafted in a limited way (i.e. to cover only cases of privatisation or demonopolisation). Two delegations circulated a proposal for text on the introduction of Annex B [DAFFE/MAI/DG3/RD(97)19] which was not discussed by the Group.

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

“Sector:

Sub-Sector:

Obligation or MAI article in respect of which an Exception is taken:

Level of Government:

Legal source or authority of the Measure:

Succinct Description of the Measure:

Motivation or purpose of the Measure:”

12. One country reserves its position on the issue of future liberalisation commitments.

2. *Each exception sets out the following elements:*¹³

- (a) Sector refers to the general sector in which the exception is taken;
- (b) Sub-Sector refers to the specific sector in which the exception is taken;
- (c) Obligation specifies the MAI provision referred to in paragraph 1 for which an exception is taken;
- (d) Level of Government indicates the level of government maintaining the measure for which an exception is taken;
- (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;¹⁴
- (f) Succinct Description of the Measure sets out non-conforming aspects of the existing measures for which the exception is taken, together with any commitment to eliminate or reduce the non-conformity of the measure;¹⁵ and
- (g) Motivation or purpose describes the rationale for a given measure.¹⁶

13. A large majority of delegations consider that the presentation would gain in transparency by incorporating an “industry classification” element into the reservation. Such element could refer to existing international classifications [the Common Product Classification (CPC) or Standard Industrial Classification (SIC) of the United Nations for instance]. The Secretariat has circulated a background note on this matter [DAFFE/MAI/DG3/RD(97)21]. Delegations are invited to finalise their position on this issue for the next meeting of the Group.

14. In order to clarify the automatic ratchet effect of List A measures, the Chairman proposed the addition of the following phrase at the end of paragraph (e): “as of the date of entry into force of the Agreement, or as continued, renewed or amended after that date.”

Some delegations consider that this issue is solved by the revised paragraph (a) of Part A or the Article. A few delegations consider that this language is relevant to the discussion of a notification obligation. Delegations are invited to reflect on this latter issue.

15. As in footnote 12, one country maintains a full reservation with regard to commitments for future liberalisation.

16. A number of delegations could support the inclusion of element (g). A number of delegations supported its deletion. Some delegations could support inclusion provided it would not be considered in the context of dispute settlement. Some delegations considered that this information should be provided in the context of the MAI negotiations but should not be retained in the final text of exceptions.

3. *In the interpretation of an exception, [all the above elements] [elements (a) to (f)]¹⁷ 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 exception 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 [significantly] exceed the scope of the non-conformity as set out in the other elements.*¹⁸

17. Several delegations feel that if element (g) were to be retained, it should not be taken into account in the context of dispute settlement. A few delegations consider that element (g) could provide valuable information in that context as well. One country considers that only elements (a) to (e) should be taken into account.

18. A large majority of delegations consider that the proposed wording for paragraph 3 fulfils the objective of protecting a Contracting Party from unreasonable recourse to dispute settlement in case of a small discrepancy between the “legal source or authority” element of the exception and the “description of the measure” element while ensuring that commitments resulting from such description would prevail over the legal source or authority in case of a “significant” discrepancy between the two. Some delegations continue to maintain a scrutiny reserve. Pending further scrutiny, one country also reserves its position, considering that the legal source or authority should always prevail in all circumstances. Another country proposes the following alternative language for paragraph 3:

“In the interpretation of an exception, [all the above elements] [elements (a) to (f)] 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 set out in the other elements, the exception shall be deemed to apply to the non-conformity of the measure as set out in the legal source or authority unless any discrepancy between the legal source or authority element and other elements considered in their totality is so substantial and material that it would be unreasonable to conclude that the legal source or authority element should prevail, in which case the other elements shall prevail to the extent of that discrepancy.”

Delegations are invited to reflect further on this proposal.

II. PREAMBLE (LABOUR AND ENVIRONMENT)

(DAFFE/MAI/DG3(97)18, Annex)

*Preamble*¹⁹

...

Recognising that agreement upon the treatment to be accorded to investors and their investments will contribute to the efficient utilisation of economic resources, the creation of employment opportunities and the improving of living standards;

...

[Resolving to] [Desiring to]²⁰ implement this agreement in a manner consistent with environmental protection and conservation;

Reaffirming their commitment to the RIO Declaration on Environment and Development and Agenda 21, including to sustainable development as reflected therein, [and including the polluter pays principle and the precautionary principle [and public participation and the right of communities to have access to information, and the avoidance of relocation and transfer of activities causing severe environmental degradation or found to be harmful to human health]],²¹ [and recognising that investment, as an engine of economic growth, can play a key role in ensuring that growth is sustainable, when accompanied by appropriate environmental policies to ensure it takes place in an environmental sound manner] [and recognising that appropriate environmental policies can play a key role in ensuring that economic development, to which investment contributes, is sustainable]^{22 23 24 25}

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19. A few delegations continued to oppose any reference to labour and the environment in the Preamble. It was the strong feeling of many delegations that preambular reference to the environment be limited to one paragraph and that it be as short as possible. Similarly, it was the feeling of many delegations that preambular reference to labour be limited to one paragraph and that it be as short as possible.
 20. Six delegations objected to the introductory phrase “resolving to”. Some of the six would support as an alternative “desiring to”. Two preferred to see “environmental protection and conservation” replaced with “sustainable development”.
 21. The majority supported explicit reference to some of the particular principles of the Rio Declaration and Agenda 21 set out in the sixth tiret of one country’s alternative for the Preamble (DAFFE/MAI/DG3(97)18, Annex, pp. 6-7). There was more support among those delegations for explicit reference to the first two (the polluter pays principle and the precautionary principle) than the latter two (public participation and the right of communities to have access to information, and the avoidance of relocation and transfer of activities causing severe environmental degradation or found to be harmful to human health). There was no consensus whether the principles should be set out in the text or in a footnote. Some delegations noted that there should be consistency with the treatment of the specific principles in the preambular language on labour.
 22. Alternative language proposed by one country. This proposal was supported by many delegations and is being studied by others. At least three delegations, however, continued to support the earlier text.
 23. One country proposed additional language: “and recognising that such environmental policies shall not constitute a means of disguised restriction on international trade and investment;”. Some delegations supported this proposal in concept but wondered if it belonged in the Preamble or in a more general anti-abuse clause in the MAI.

Renewing their commitment to the observance of internationally recognised core labour standards, i.e. freedom of association, the right to organise and bargain collectively, prohibition of forced labour, the elimination of exploitative forms of child labour, and non-discrimination in employment,²⁶ and noting that the International Labour Organisation is the competent body to set and promote [deal with]²⁷ core labour standards world-wide.^{28 29}

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24. One country, supported by another, would insert four additional turrets from its alternative for the Preamble (DAFFE/MAI/DG3(97)18, Annex, pp. 6-7):
- Convinced of the need for optimal use of the world's resources in accordance with the objective of sustainable development;
- Recognising that investment can result in changes in the scale and structure of economic activity within countries, with potential effects on health and the environment;
- Recognising the interdependent nature of their environments;
- Encouraging the protection, conservation, preservation and enhancement of the environment;
25. Delegations are invited to reflect further on the content of this turret and of the previous one, and their relationship. One country's proposal for amalgamating the two turrets, supported by a few delegations, was:
- Resolving to implement this agreement in accordance with international environmental law and in a manner consistent with sustainable development, as reflected in the RIO Declaration on Environment and Development and Agenda 21, including the protection and preservation of the environment;
26. These principles reflect the Declaration of the Copenhagen World Summit on Social Development and the Singapore WTO Ministerial. One country proposed explicit mention of the Copenhagen Declaration and Singapore Ministerial in the text with the principles set out in a footnote. Another proposed a parenthetical reference to the principles in the text, reflecting the language of the Copenhagen Declaration
27. One delegation, supported by a number of others, preferred "deal with" as an alternative to "promote" because it had a somewhat wider meaning.
28. Three delegations continued to oppose any reference to labour in the Preamble. Another delegation could not support a reference to labour in the preamble if it included explicit statement of basic principles of core labour standards.
29. One country would insert three additional turrets from its alternative for the Preamble (DAFFE/MAI/DG3(97)18, Annex, pp. 6-7):
- Recognising that development of economic and business ties can promote respect for core labour standards;
- Resolved to foster investment with due regard for the importance of labour laws and core labour standards;
- Noting that, as members of the International Labour Organisation, they have endorsed the Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy, and agreeing to renew their support for that voluntary instrument.