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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 THE LODGING OF COUNTRY SPECIFIC RESERVATIONS**

**(Note by the Chairman)**

## DRAFT ARTICLE ON THE LODGING OF COUNTRY SPECIFIC RESERVATIONS

(Note by the Chairman)

1. At its February 1997 meeting, the Negotiating Group requested Drafting Group N°3 to prepare the text of an Article on the lodging of country specific reservations and to report on the results of their work to the Negotiating Group at its March 1997 meeting [item 5 and Annex 2 of DAFFE/MAI/M(97)2].

2. The guidance available to draft such a provision can be found in section VIII (pages 126-128) of the Consolidated Commentary to the Consolidated text. The most relevant part, paragraph 1.3, provides that for those areas where the Contracting Parties are ready to commit to standstill, it would be necessary that:

“a) each Contracting Party list all non-conforming measures in an Annex to the Agreement;

b) 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.”

3. Paragraph 1 of the draft article proposed below captures the principles in paragraph 2 a), c) and d) above. The principle of paragraph 2 b) is captured in the guidance provided by the letter of the Chairman of the Negotiating Group on the lodging of country specific reservations [DAFFE/MAI/RD(97)1]. The format proposed by the Chairman of the Negotiating Group (and which is reproduced in the Annex to this Note) is indeed an intrinsic part of this proposal.

## Draft Article

A. *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<sup>1</sup> 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. Articles W, X; Y and Z do not apply to any measure that a Contracting Party [adopts] or [maintains] with respect to sectors, subsectors or activities, as set out in Annex ... of the Agreement.]*

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1. It is understood that the format for formulating reservations in a Contracting Party's schedule is that proposed in DAFFE/MAI/RD(97)1.

## COMMENTARY

### *Paragraph A*

1. The *chapeau* lists the various articles of the Agreement to which a reservation could be lodged. This list is an open one because some of the disciplines of the MAI are still under consideration. The Chairman of the Negotiating Group nevertheless suggested last February that reservations should focus on the “substantive obligations of the MAI, notably National Treatment and MFN treatment and, if necessary, new disciplines” [DAFFE/MAI(97)11, paragraph 5]. The *chapeau* adopts this working assumption. The language could be finalised once there is text on all new disciplines and negotiators have determined where reservations would be allowed.

2. *Sub-paragraph (a)* indicates that Schedules attached to the Agreement would contain a list of all existing non-conforming measures each Contracting Party is allowed to “maintain” with respect to the articles<sup>2</sup> mentioned in the *chapeau*. The non-conforming measures in question concern measures taken at all levels of government (federal, state, province, land, canton, ...)

3. The listing of “existing” non-conforming measures is consistent with the “top down” approach adopted for the lodging of country reservations under the MAI. The use of the term “maintain” also presumes standstill. The proposed language will not allow, for instance, the adoption of new non-conforming measures in addition to those already listed.

4. It is to be noted, however, that the degree of standstill actually achieved will also depend on the extent to which the description of non-conforming measures in the respective schedules of the Contracting Parties corresponds to the nature and scope of the underlying restrictions. It is for this reason that the Chairman of the Negotiating Group encouraged delegations to formulate their reservations as narrowly as possible [DAFFE/MAI/RD(97)1].

5. It should also be noted that sub-paragraph (a) would not preclude the adoption of additional schedules of non-conforming measures. Annex III of NAFTA allows Mexico to maintain activities reserved to the Mexican State. The introduction of different lists is, of course, a matter for negotiation.

6. Sub-paragraphs (b) and (c) ensure that non-conforming measures can be extended in time or modified, as necessary, without offending the standstill principle, so long their conformity with the substantive obligations does not decrease.

### *Paragraph B*

7. While it is recognised that “standstill” should be a minimum objective for liberalisation under the MAI, the Note by the Chairman of the Negotiating Group also acknowledged that standstill may not ultimately apply across the board to all sectors and in all circumstances [paragraph 6, DAFFE/MAI(97)11]. If this were to be the case, it would be necessary that the MAI provide for such exceptions to the substantive obligations of the MAI.

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2. The articles listed in NAFTA concern National Treatment, MFN Treatment, Performance Requirements and Senior Management and Board of Directors.

8. This could be done by identifying the sectors or activities where standstill would not apply. Non-conforming measures in these sectors or activities could be listed in separate schedules annexed to the Agreement. It would be premature for the Drafting Group to identify the sectors or activities that would be exempt from the standstill principle. It may be useful, however, to provide the necessary language for possible inclusion in the Article on the lodging of country specific reservations, as proposed in Paragraph B of the draft text.

*Annex*

**Standard presentation of individual country-specific reservations**

**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:**

**Purpose or Motivation of the Measure:**