



Negotiating Group on the Multilateral Agreement on Investment (MAI)

**LIBERALISATION AND THE LODGING OF
COUNTRY SPECIFIC RESERVATIONS**

(Note by the Chairman)

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I. Introduction

1. This note is designed to facilitate the process of lodging country specific reservations. It offers a set of general guidelines. These guidelines will need to be applied with a degree of flexibility.
2. The note begins with some general observations on the role of country specific reservations and our objectives for the MAI. It then takes up a series of generic issues which merit consideration. Finally, it suggests a procedure for carrying the process forward.

II. General Observations

3. We are agreed that country specific reservations will form an essential part of the MAI. Discussions on reservations will therefore proceed from now on in parallel with our work on the text of the MAI itself.
4. We are agreed to seek high standards, both in the text of the MAI and by minimising the scope of country specific reservations. As far as possible, we should avoid compromising one or the other of these objectives. However, there might be occasions when the best result will require a trade off between these two objectives.
5. Consistent with these objectives, we should agree on the following general guidelines:
 - there should be no reservations on systemic matters, such as the definition of investment or core elements of the dispute settlement regime;
 - reservations should thus focus on the substantive obligations of the MAI, notably national treatment and MFN and, if necessary, new disciplines;
 - even in the area of national treatment and MFN, sweeping horizontal reservations or carve-outs would not be desirable.
6. A minimum objective will be "standstill". Further consideration will be needed, however, on whether standstill should apply across the board to all sectors and how the concept should be dealt with in the text of the MAI. (These matters are discussed in a commentary to the Consolidated Text reproduced in an annex to this note.) Some delegations have suggested that exceptions to standstill could be "compensated" by concessions elsewhere in the negotiations.
7. The reservations proposed so far clearly need further work. Individual countries may need to add or subtract from the current list as work on the MAI text evolves and as a result of further examination of their domestic laws, regulations and practices.
8. Delegations have remarked that some of the preliminary lists of reservations assume a REIO clause and others contain reservations only at the level of the central government.

9. There can be no fixed rules for the lodging of reservations. Ultimately, each Contracting Party must take full responsibility for the commitments it makes under the MAI and thus for the specific reservations to be lodged and it is for the other Contracting Parties to decide if they are prepared to accept them. However, there is value in seeking some minimum degree of common understanding about how the MAI rules should be applied. This would help achieve a minimum degree of consistency in the reservations lodged by different Parties.

III. Generic Issues

10. The following issues may benefit from consideration in the Negotiating Group with a view to determining their treatment with respect to reservations:

a) “*Reporting requirements*”, for example for statistical purposes. No reservation would be needed if the requirement does not subject investment to authorisation or impose delay for the investment

b) “*De facto*” measures are those which are formally non-discriminatory but have the intent or the effect of raising special barriers to foreign investors or their investments. Such measures would call for reservations.

c) “*Prudential*” measures: Measures covered by the prudential carve-out do not need to be covered by reservations. They are, however, covered by the transparency provisions. Other discriminatory measures would call for reservations even if the country concerned considered the measures justified on prudential grounds.

d) “*Inactive*” regulations: where countries have rules on the books which allow the authorities to exercise discretion and to discriminate against foreign investment they would need to reserve their position unless they are ready to commit themselves never to activate such rules in a discriminatory manner.

e) *Services* : hopefully, countries will generally agree to go beyond their GATS commitments, but if they were not ready to do so in specific sectors, they would need to lodge reservations to the MAI.

f) *Special programmes for geographical regions* would not call for reservations unless the programmes involved discrimination against foreign investors or their investments. (Application of the national treatment standard to subnational levels of government needs to be taken up separately).

g) *Special programmes for specific groups of people* (e.g. aboriginal people) should be covered by reservations.

h) *Residence requirements*: a prior residence requirement should be considered in the same way as a nationality requirement and thus contrary to national treatment.

i) *Professional services*: where treatment of foreign nationals differs from that accorded to nationals, this should be considered contrary to national treatment in all cases, whether de jure or de facto.

j) *New sectors/new technology*: can new reservations be lodged in the future where new technology or new sectors of economic activity emerge? This matter has been discussed previously (see attachment).

k) *Privatisation/demonopolisation*: Can new reservations be lodged in the future where sectors closed to private competition are opened up? This matter is for consideration in the context of specific MAI provisions on privatisation and monopolies.

l) *Existing international agreements*: should reservations refer to rights or obligations undertaken by MAI Parties in bilateral, regional or multilateral agreements? As far as possible, any necessary reservations should be limited to the sector concerned (e.g. fishing).

m) *Measure*: Measures calling for reservations would be laws, regulations and administrative practises.

IV. Procedure

11. I suggest we proceed as follows:

a) bilaterally: it seems to me that most of the work on reservations and consultations on request and offer need to take place directly between delegations according to the arrangements that delegations themselves will make;

b) in the Negotiating Group, in plenary or informally, for example at lunch, we may discuss:

- generic issues and specific categories of exceptions (for example particular sectors);
- follow the evolution of country specific offers and the overall balance of commitments, taking into account the development of the MAI text itself; and
- the drafting of specific provisions for the lodging of reservations, making due allowance for future changes in regulations without making them more restrictive and providing a “ratchet mechanism” to ensure that future liberalisation is made permanent.

12. Consideration will also need to be given to rollback, including the possibility of peer pressure through the Parties Group, future rounds of negotiation or both.

Attachment

(Extract from the Consolidated Commentary to the Consolidated Text DAF/MAI(97)1)

1. Standstill and the Listing of Country Specific Reservations

1.1. The MAI aims to ensure a high minimum standard of treatment for investors and their investments, including National Treatment and MFN treatment. Standstill would result from the prohibition of new or more restrictive exceptions to this minimum standard of treatment. From this perspective, a violation of standstill would be a violation of the underlying MAI obligations (e.g. of National Treatment and MFN), and the dispute settlement provisions would apply to such breaches of the MAI obligations.

1.2. Standstill would not apply, however, to any general exceptions (e.g. national security) or to any temporary derogations (e.g. balance of payments) that might be allowed under the MAI.

1.3. For those matters where Contracting Parties are ready to commit to standstill, the Drafting Group considered that:

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

b) the 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.

Of course, if the MAI obligations were expanded, Article 1.5 (a) - (d) would come into play again with respect to the new or enlarged obligations.

1.4. The Drafting Group considered that further discussion is needed on the question of country specific reservations in certain sensitive sectors and new economic activities that may emerge in the future. Some delegations suggested flexibility could be achieved by separate annexes to the Agreement for the listing of country specific reservations in these areas.

1.5. The Drafting Group also considered that a standard presentation of the non-conforming measures listed in Contracting Parties' specific reservations would enhance transparency and facilitate the operation of the Agreement. The Drafting Group felt that specific reservations listed in the schedules of the Contracting Parties should include the following elements:

a) the obligation or MAI article in respect of which the reservation is taken;

b) the sector(s) or sub-sector(s) covered by the reservation ;

c) the level of government which maintains the non-conforming measure;

- d) the legal source or authority of the non-conforming measure;
- e) the description of the non-conforming measure; and
- f) the purpose of the non-conforming measure.

1.6. For practical reasons, however, the amount of information to be provided should be limited to the minimum necessary to describe the non-conforming measures. This may be particularly relevant to sub-national (e.g. state and local) measures, not all of which may merit listing.

2. ROLLBACK

2.1 Rollback is the liberalisation process by which the reduction and eventual elimination of non-conforming measures to the MAI would take place. It is a dynamic element linked with standstill, which provides its starting point. Combined with standstill, it would produce a "ratchet effect", where any new liberalisation measures would be "locked in" so they could not be rescinded or nullified over time.

2.2 There are a number of ways for achieving rollback. The most commonly known in the trade field is that of successive rounds of negotiations where rollback results from the trade-offs or exchange of trade concessions. Peer pressure through periodic examinations of Member countries' restrictions has been the approach of the OECD liberalisation instruments. Rollback commitments may also be inscribed in schedules of commitments or list of reservations. While this has not been a generalised practice, it has been done in some cases under the OECD instruments.

2.3. Rollback might be achieved through:

a) liberalisation commitments by the Contracting Parties effective on the date of entry into force of the MAI. This would imply that that not all restrictions currently maintained would be included in the list of reservations of the Contracting Parties;

b) rollback commitments inscribed in a country reservation or description of a non-conforming measure by means of a "phase-out" or a "sunset clause" specifying a future date when the non-conforming measure would be removed or made more limited in the future. Phase-out or sunset provisions could not be envisaged for all non-conforming measures. They might be useful, however, where the phase-out of a non-conforming measure is inscribed in domestic legislation or where a Contracting Party is able to commit itself to future liberalisation by a specified date.

2.4. Rollback after the entry into force of the MAI could result from:

a) an obligation for a Contracting Party to adjust its reservations to reflect any new liberalisation measure (the "ratchet" effect).

b) periodic examinations of non-conforming measures. These examinations could lead to recommendations in favour of the removal or limitations of specific measures. These reviews could be conducted on a country-by-country basis, or on an horizontal or sectoral basis, taking into account the degree of liberalisation already achieved; and

c) future rounds of negotiations designed to remove non-conforming measures. The decision to launch future negotiations could be taken at the conclusion of the MAI negotiations or the MAI could provide a specific date for the first round of such negotiations.

2.5 The "Parties Group" could have the role of monitoring the adjustment of country reservations, conducting periodic examinations of non-conforming measures or launching future rounds of negotiations.