



Negotiating Group on the Multilateral Agreement on Investment (MAI)

**GUIDELINES FOR THE LODGING OF COUNTRY SPECIFIC
RESERVATIONS TO THE MAI**

(Note by the Chairman)

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I. Introduction

1. Substantial agreement emerged at the last meeting of the Negotiating Group over the direction of work on the subject of liberalisation and the lodging of country specific reservations over the coming months. It was generally felt that this work should involve the continuation in parallel of bilateral consultations between delegations and discussions in plenary sessions of the MAI, finalisation of the article on lodging of country specific reservations, and the preparation of a revised list of country specific reservations to the MAI after the September 1997 meeting [DAFFE/MAI/M(97)6]. In addition, it was agreed that “guidelines” should be elaborated for the lodging of such reservations to assist delegations in revising their initial lists on the basis of the same working assumptions. This exercise was not meant, however, to substract delegations from their responsibilities concerning the drafting of their reservations.

2. Guidelines set out in the present document address the main generic or technical issues that have been raised by delegations and take account of comments received from delegations on the draft circulated by the Secretariat in July [DAFFE/MAI(97)28]. More particularly, items a) to g) record the understandings that seem to have found substantial support from delegations during previous discussions of the Chairman’s notes [DAFFE/MAI(97)11 and DAFPE/MAI(97)14]. Items h) - m) suggest possible guidelines on a number of other technical or generic questions.

3. This document does not address political issues under negotiation. It also leaves aside definition and methodology issues addressed by the draft article on the lodging of country specific reservations under discussion in Drafting Group n°3 [DAFFE/MAI/DG3(97)12].

II. Proposed Guidelines

a) Reporting requirements

4. No reservation would be needed for a reporting requirement, for instance for statistical purposes, as long as the requirement in question does not in itself subject the investment to authorisation or impose delay.

b) Prudential measures

5. Measures covered by the MAI article on prudential measures¹ do not need to be covered by reservations. They are, however, covered by the transparency and dispute settlement provisions of the MAI.

c) Reciprocity

6. Reciprocity requirements are inconsistent with the MFN obligation (unless applied in the context of the MAI article on recognition arrangements for financial services)². They should therefore be covered by country specific reservations.

d) Inactive laws and regulations

7. Inactive laws and regulations which allow the authorities to exercise discretion and to discriminate against foreign investors and their investments should be covered by reservations if there is any possibility they could be activated in the future. The absence of reservations would imply a commitment by the authorities not to activate them in a discriminatory manner or to abolish them when the MAI enters into force.

e) Measures favouring specific geographical regions

8. Measures favouring specific geographical regions would not call for reservations unless the programmes involved discrimination against or between foreign investors or their investments.

f) Measures favouring specific groups of people

9. Measures favouring specific groups of people (such as aborigines, ethnic minorities or handicapped people) would not call for reservations unless the programmes involved discrimination against or between foreign investors or their investments. Government measures to support³ such groups of people open to foreign investors and their investments on terms comparable to those offered to national investors would be consistent with National Treatment and Most Favoured Nation obligations.

g) Professional services

10. Non-discriminatory measures regulating professional qualifications of individual practitioners would be compatible with the MAI. However, nationality requirements or any other measure resulting in treatment of foreign investors and their investments (whether natural persons or juridical

1. See Consolidated Text and Commentary [DAFFE/MAI(97)1/REV2, section VII].

2. See Consolidated text and Commentary [DAFFE/MAI(97)1/REV2, section VII] The possibility of adopting a general article on recognition arrangements is under discussion in Drafting Group N°3.

3. The treatment of such special assistance programmes may also be affected by the MAI provisions under concerning Investment Incentives [DAFFE/MAI(97)1/REV2/section III] and Performance Requirements [DAFFE/MAI/ST(97)12/REV1, Part III].

persons) less favourable than that accorded to national investors and their investments, should be considered to be inconsistent with national treatment⁴.

h) Provision of cross-border services

11. Irrespective of how this will be handled⁵, it is agreed that the MAI is not intended to cover the provision of services on a cross-border basis (*i.e.* without establishment of the services supplier in the country where the service is supplied)⁶. Accordingly, restrictions on such operations would not require a reservation.

i) Existing international agreements

12. Unless specified otherwise in the Agreement⁷, preferential treatment accorded under existing multilateral, plurilateral or bilateral agreements which results in less favourable treatment to investors of any Contracting Party, or to investments of investors of any Contracting Party, should be covered by reservations to the MFN obligation. Reservations lodged with respect to such discriminatory treatment, which can be found in particular sectors or activities (e.g., air transport, fishing), should be limited to the discriminatory measure or sector concerned. A proposal for a REIO clause is under discussion.

j) What “de facto” measures will be considered incompatible with the National Treatment obligation?

13. The National Treatment obligation in GATT encompasses “*de facto*” measures for which there is jurisprudence. This concept is also embodied in the National Treatment obligation of the GATS (Article XVII) which applies to all four modes of delivery including commercial presence.

14. Drawing on the approach in the GATS, formally identical or formally different treatment could be considered to be contrary to National Treatment under the MAI if it modifies the conditions of competition in favour of investors and their investments of a Contracting Party compared to investors of another Contracting Party or their investments. Text could be drafted in Drafting Group N°3.

15. The conditions of establishment and operations might not always need to be identical because of the “like circumstances” test. Any differences of treatment should be justified by the differences of circumstances. (It remains to be decided whether the national treatment obligation should contain an explicit reference to “like circumstances” but it is agreed in principle that such a test should apply.)

4. This issue is also related to that of recognition arrangements, which is under discussion in Drafting Group N°3 [DAFFE/ MAI(97)1/REV2, section VII].

5. The possibility or need for a special provision or interpretative note on this subject is under discussion in Drafting Group N° 3 [DAFFE/MAI/DG3(97)10/FINAL]

6. See [DAFFE/MAI/DG3(97)10/FINAL, paragraph 30 and DAFFE/MAI/ST(97)12, section III, footnote 7].

7. It is proposed, for instance, that the proposed article on Performance Requirements [DAFFE/MAI/ST(97)12/REV1, section III] would not affect any obligations that may exist under the WTO Government Procurement Agreement.

k) Residence

16. A residence requirement for investors⁸ would deny national treatment to investors (whether natural or juridical persons) wishing to establish a new business or expand an existing one or simply to make a portfolio investment. *A fortiori*, prior residence requirement for investors (e.g., a requirement that an investor be resident in the country concerned for five years before being eligible to make an investment in a service sector) would require a reservation. Such a requirement would deny national treatment to investors and their investments, whether natural or juridical persons.

17. A residence requirement concerning investments⁹ in which investors might engage would be compatible with national treatment if designed to provide national treatment to resident investments while preventing the cross-border provision of services into the country concerned by non-residents¹⁰.

18. Whether different treatment of resident and non resident investors or their investments should be regarded as consistent with national treatment would depend primarily on the "like circumstances" test.

19. Where different treatment applies between residents and non-residents, the difference in treatment should be justified by the difference in circumstances between residents and non-residents.

20. If nationals who are non-residents are treated more favourably than other non-residents, a reservation should be lodged.

l) Forms of Establishment

21. Investors should be permitted to establish investments in any form (e.g. branch, subsidiary) that is permitted to domestic investors¹¹.

m) Measures outside a Contracting Party's jurisdiction

22. There is no obligation under the MAI which requires a Contracting Party to take measures outside its territorial jurisdiction.

8. As defined in the Consolidated Text and Commentary [DAFFE/MAI(97)1/REV2, section II].

9. As defined in the Consolidated Text and Commentary [DAFFE/MAI(97)1/REV2, section II]

10. It may be noted that under the GATS, a residency requirement, local presence requirement or a commercial presence requirement imposed on a service supplier is considered to be a limitation on the "cross-border" mode of delivery of a service but not on the "commercial presence" mode of delivery which is part of the field covered by the MAI.

11. This issue has also been discussed by Drafting Group N°3 in connection with a special provision on "Special Formalities" [see DAFPE/MAI(97)1/REV2, page 107].