



Negotiating Group on the Multilateral Agreement on Investment (MAI)

EXCEPTIONS, SAFEGUARDS AND RESERVATIONS

(Note by the Chairman)

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1. We have made considerable progress in developing the disciplines in the MAI, as well as procedures for dispute settlement, but the MAI will not be complete without agreement on general exceptions, temporary safeguards and country specific reservations. There too we have proposals for text in many areas and Delegations will shortly submit their revised lists of reservations. However, if we make a simple addition of all the proposals currently on the table, we will seriously weaken the scope of commitments to the liberalisation and protection of investment. These various proposals need the close attention of negotiators if we are to achieve a balanced and high standards agreement. We must also recall that further work is needed on certain aspects of the definition of investment, including the treatment of intellectual property and concessions, which could have implications for the scope of the agreement.

General Exceptions

2. As in any international agreement it will be necessary and appropriate to include in the MAI a certain number of rules that provide general exceptions and temporary safeguards with respect to MAI disciplines and thereby preserve essential freedom of action for governments for overriding public purposes. Clearly, however, these exceptions and safeguards need to be as limited as possible and wherever possible subject to surveillance or anti-abuse provisions. In some areas, the drafting of text is well advanced. In others, text has been proposed by some countries or groups of countries but consensus has yet to be found.

3. The general exceptions under consideration are as follows:

- *Essential Security Interests*
- *Public Order*
- *Monetary and Exchange Rate Policies*

In some cases, proposals have been made to subject these exceptions to an anti-abuse clause, transparency/notification requirements, consultations (bilateral or multilateral) and dispute settlement. However, unlike country-specific reservations, these general exceptions would apply to all Parties and would not be subject to “rollback”.

4. In addition, proposals for text have been made to introduce exception clauses for cultural industries and for regional economic integration organisations (REIOs). Both of these provisions would *inter alia* allow for the possibility of future departures from “standstill”.

Temporary Safeguards

5. Given the broad definition of investment, a temporary safeguard provision has been developed to allow a dispensation from certain MAI provisions in the event of serious balance of payments and external financial difficulties or where capital movements cause serious difficulties for monetary or exchange rate policies. Recourse to the safeguard clause would be subject to surveillance by the Parties Group and the International Monetary Fund.

Country Specific Reservations

6. For the most part, the preliminary lists of country specific reservations are consistent with “standstill”. However, various proposals have been made to allow individual countries or groups of countries to take new non-conforming measures in areas of political importance or sensitivity. Proposals by one or more delegations include:

-- *Privatisation and demonopolisation.* Countries might be permitted to lodge reservations at the outset to preserve the freedom to restrict foreign investment on the occasion of future privatisation or demonopolisation with respect to defined sectors or activities.

-- *GATS.* Countries might be permitted to specify in their reservation schedules that they accept no commitment in the MAI regarding services that exceeds their commitments in GATS.

-- *“List B” Reservation Schedules.* Countries might be permitted to specify in a separate (List B) reservation schedule specific sectors or activities to which standstill would not apply. Proposals of this nature concern such sectors as air and maritime transport, telecommunications transport networks, research and development, real estate, privatisation, public procurement, subsidies and measures taken at subnational levels of government. A related proposal would identify sectors where measures would not be subject to dispute settlement.

-- *Modification of Schedules.* Countries might be authorised to amend their reservation schedules in the future, subject to “compensating” measures, along the lines of GATS Article XXI.

7. Despite the practical difficulty, it will be necessary for Delegations to compare these different approaches -- and to weigh their relative importance -- with a view to assessing the overall scope and balance of commitments.

Questions:

1. *Do delegations agree that exceptions, derogations and reservations must be kept to a minimum to ensure that the MAI will be a high standards agreement?*
2. *Which of the “exceptions” mentioned in paragraphs 3 and 4 should be retained? Taking as a starting point the proposal on essential security interests and public order [DAFFE/MAI/RD(97)41], what controls should apply to such exceptions?*

3. *In lodging country-specific exceptions or reservations, should future departures from standstill be permitted and if so:*
 - a. *for privatisation and demonopolisation?*
 - b. *for specified sectors or for a limited number of sectors per country?*
 - c. *for the National Treatment and MFN Treatment obligations only, or for other obligations as well?*
 - d. *through a provision allowing the future modification of schedules of reservations modelled on Article XXI of GATS?*
4. *What “rollback” mechanisms should apply to reservations, for example, Parties Group examinations or future rounds of negotiation of all reservations?*
5. *By what combination of approaches should the satisfactory scope and overall balance of commitments be achieved?*