



Negotiating Group on the Multilateral Agreement on Investment (MAI)

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

(Note by the Chairman)

Liberalisation and the Lodging of Country-Specific Reservations

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I. Introduction

1. This note contains further guidelines to facilitate the lodging of country specific reservations, supplementing the first note discussed in February [DAFFE/MAI(97)11]. It responds to some of the generic issues raised in the various country contributions received to date.
2. It will be noted that in some cases the issue at stake is essentially technical in nature, while in other cases the issue calls for political agreement on how best to proceed.
3. Many delegations have emphasised that they see considerable value in seeking a minimum degree of common understanding about how the MAI rules should be applied, thereby to achieve some consistency in the reservations lodged by different Parties. Nevertheless, I would recall that each Contracting Party must ultimately take full responsibility for the commitments it makes under the MAI and thus for the specific reservations to be lodged.

II. Generic Issues

1. Issues Calling for Further Review by Individual Countries

4. It has been suggested that the preliminary lists of reservations are inadequate in certain respects and require careful review by the countries concerned. This would be very useful and I encourage all countries to undertake such a review, benefiting from the lessons learned from our discussions so far on generic issues.

a. *New Legislation:* New non-conforming measures should be avoided during the period of negotiations and prior to entry into force. Any such new measures would negatively affect confidence and upset the negotiation of an appropriate balance of commitments.

b. *New Disciplines:* As the rules on Special Topics (key personnel, performance requirements, privatisation, monopolies/concessions, investment incentives) take shape, the question arises to what extent countries would need reservations for non-conforming measures and under what conditions reservations would be permitted. Delegations are invited to provide relevant information as input for discussion by the Negotiating Group.

c. *Sub-National Measures:* Information on sub-national measures needs to be completed by all countries, including measures at state, provincial and local level. It would assist the process if DG3 were asked to draft a provision on the application of National Treatment to sub-national governments.

d. *Dependent Territories:* Where Parties to the MAI will include overseas or dependent territories, information needs to be provided on the names of the territories and any proposed reservations for those territories.

e. *Public Order and Cultural Measures*: While the treatment of these issues remains to be determined, delegations are invited to provide information on the measures they seek to protect.

f. *REIO*: While the question of a special clause for REIOs is still under discussion, there is a need for transparency regarding the measures that could be covered by such a clause. Interested delegations are invited to supply relevant information.

2. *Issues Requiring Further Discussion*

5. The following issues call for further consideration by the Negotiating Group.

a. *Measure*: It may be useful to have DG3 develop a definition of “measure”.

b. *“In like Circumstances” “Equal Competitive Opportunity”*: It remains to be decided whether either of these terms should be included explicitly in the national treatment provision. However, one or the other of these concepts might be useful to clarify whether certain measures would conform to national treatment, e.g. special rules following small and medium-sized enterprises, and authorisation procedures including the question of delay. Alternatively, a provision such as Article 5 of the OECD Codes (“Controls and Formalities”)¹ might offer a solution for bona fide differences of treatment between foreign and domestic investors.

c. *“De Facto” measures* would call for reservations in certain circumstances. Since “intent” is largely subjective and the “effects” of non-discriminatory measures may not be within the power of governments to determine, a possible test would be to focus on “discrimination which is substantial and foreseeable”.

d. *Residence*: While a prior residence requirement would discriminate against foreign investors, a simple residence requirement would not normally be discriminatory. Hence, residency requirements for domestic entitlement programmes, e.g. for training and research and development, would be consistent with national treatment.

e. *Professional Services*: The MAI obligations would apply to investors and investments and would not interfere with bona fide requirements for professional qualifications of individual practitioners.

¹ Article 5 of the Codes reads as follows:

- a. The measures of liberalisation provided for in this Code shall not limit the powers of Members to verify the authenticity of current invisible operations nor to take any measures required to prevent evasion of their laws or regulations.
- b. Members shall simplify as much as possible all formalities connected with the authorisation or verification of current invisible operations and shall co-operate, if necessary, to attain such simplification.

f. *MAI/GATS*: (i) More work is needed to respond to the concern that MAI would unintentionally bring the cross-border provision of services into its disciplines. (ii) Further consideration is needed of the extent to which country specific reservations are needed where the MAI investment obligations overlap with the commercial presence obligations of the GATS, especially in sensitive sectors such as financial services and telecommunications.

g. *MAI and Other International Agreements*: Consideration is needed as to whether MFN reservations may be lodged to protect rights under existing and/or future bilateral and regional agreements.

h. *Reciprocity*: A reciprocity requirement would be contrary to MFN (unless applied in the context of a recognition arrangement such as envisaged by EG5 for financial services). Could agreement be reached to prohibit new and phase out existing reciprocity measures among MAI parties on the ground that reciprocity would be achieved by the balance of commitments in the MAI?

i. *Standstill/Rollback*: DG3 has been asked to draft articles on the lodging of reservations. The Negotiating Group should consider whether certain categories of reservations could be exempted from standstill and rollback commitments.

III. Next Steps

6. Drafting Group N° 3 is preparing for us a article on the lodging of country specific reservations. I propose that we also ask DG3 to draft:

- a. A definition of “measure”;
- b. A provision on the application of national treatment to sub-national levels of government.

7. In the Negotiating Group, I suggest that we continue the process of collecting generic questions by Delegations concerning their own reservations and those submitted by others. If necessary, I would issue in advance of the April meeting another note to provide guidance on those issues. I do not suggest that we spend much time in the Negotiating Group itself to discuss these issues, but Delegations are welcome to provide written comments.

8. At future meetings, we could proceed to a general discussion of certain categories of proposed reservations which are of general interest for the operation of the future agreement, in particular:

- MFN exceptions and reciprocity requirements;
- reservations lodged in the area of services and the relationship to the GATS commitments entered into by Member countries;
- reservations relating to areas other than national treatment and MFN.