



**Negotiating Group on the Multilateral Agreement on Investment (MAI)**

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

**(Note by the Secretariat)**

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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. The Chairman concluded 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].

2. The Chairman of the Negotiating Group also proposed to submit to delegations "guidelines" for the lodging of country specific reservations taking into account his earlier notes on this subject [DAFFE/MAI(97)11 and DAFPE/MAI(97)14] and the generic or technical issues raised orally or in writing by delegations. With a view to making use of the summer break efficiently, he invited the Secretariat to prepare as soon as possible, an initial draft for such guidelines and to invite delegations to provide written comments on such draft to allow for the preparation of a more definite note for the consideration of the Negotiating Group at its September 1997 meeting.

3. The present Secretariat note responds to this request, recalling first the general objectives set by the Chairman of the Negotiating Group for the lodging of country specific reservations and suggesting "guidelines" for those generic or technical issues that have been raised.

4. This documents does not address, however, political issues under negotiation (such as the REIO clause, subnational measures, public order or culture) or the general question of the relationship between the MAI and the GATS.

#### **II. General Objectives for the lodging of country specific reservations**

5. The general objectives for the lodging of country specific reservations were set out last February by the Chairman in the following terms [section II of DAFPE/MAI(97)11]:

*"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.*

*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.*

*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.*

*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.*

*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.*

*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.*

*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 or Technical Issues**

6. The present section is devoted to the generic or technical issues raised by delegations in connection with the drafting or interpretation of the preliminary lists of country specific reservations to the MAI that have been submitted [DAFFE/MAI/RES(97)31 and DAFPE/MAI(97)5/REV1]. Items a) to g) records the understandings that seem to have found substantial support from delegations during previous discussions of the Chairman notes [DAFFE/MAI(97)11 and DAFPE/MAI(97)14]. Items h) - l) suggest possible guidelines on a number of other technical or generic questions.

#### **a) Reporting requirements**

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

***b) Prudential measures***

8. Measures covered by the MAI article on prudential measures 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.

***c) Reciprocity***

9. Reciprocity requirements are contrary to the MFN obligation (unless applied in the context of recognition arrangements such as those provided by the MAI article on recognition arrangements for financial services). They should be therefore covered by country specific reservations.

***d) Inactive laws and regulations***

10. Where countries have inactive laws and regulations which allow the authorities to exercise discretion and to discriminate against foreign investment they would need to lodge reservations unless they are ready to commit themselves never to activate such rules in a discriminatory manner.

***e) Special programmes for geographical regions***

11. Special programmes for geographical regions would not call for reservations unless the programmes involve discrimination against foreign investors or their investments.

***f) Special programmes for specific groups of people***

12. Special programmes for specific groups of people (e.g. aboriginals) would not call for reservations unless the programmes involve discrimination against foreign investors or their investments.

***g) Professional services***

13. Non-discriminatory measures regulating professional qualifications of individual practitioners would be compatible with the MAI. But where treatment of foreign investors and their investments (whether natural persons or juridical persons) is less favourable than that accorded to nationals, this should be considered contrary to national treatment.

***h) Provision of cross-border services***

14. Irrespective of how this will be recorded (a special provision or an interpretative note) and to what provisions it will apply (financial services, performance requirements...), 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) [DAFFE/MAI/DG3(97)10/FINAL, paragraph 30 and DAFPE/MAI/ST(97)12, section III, footnote 7]. Accordingly, restrictions on such operations would not require a reservation.

*i) Existing international agreements*

15. Preferential treatment accorded under existing international agreements which results in discriminatory treatment among the Contracting Parties should be covered by reservations to the MFN obligation. Any necessary reservations should be limited to the discriminatory measure or sector concerned (e.g. air transport, fishing). A proposal for a REIO clause is under discussion.

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

16. 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.

17. 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 investments.

*k) Residence*

18. A residence requirement for investors 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.

19. A residence requirement for certain activities in which investments might engage would be compatible with national treatment if designed so as to provide national treatment to resident investments while preventing the cross-border provision of services into the country concerned by non-residents.

20. 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. (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.)

21. Where different treatment applies between residents and non-residents:

- The difference in treatment should not exceed what would be justified by the difference in circumstances between residents and non-residents.
- Nationals that are non-residents should be treated the same as other non-residents.
- Permanent residents should be treated as other residents (nationals).

*l) Forms of Establishment*

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

23. The conditions of establishment and operations might not always need to be identical because of the “like circumstances” test, but differences of treatment should not exceed what would be justified by the difference of circumstances.

## Attachment

(Extract from the Consolidated Commentary to the Consolidated Text DAF/MAI(97)1/REV2)

### **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.