



---

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

**RESULTS OF THE MEETING OF THE TECHNICAL GROUP  
ON COUNTRY SPECIFIC EXCEPTIONS**

**REPORT TO THE NEGOTIATING GROUP**

## **REPORT TO THE NEGOTIATING GROUP**

1. I am pleased to submit the results of the Technical Group discussions held on 21-23 January 1998. Pursuant to the mandate given to it by the Negotiating Group, the Technical Group proceeded with a review of the measures underlying the preliminary lists of cross-sectoral country exceptions that have been made to the MAI obligations and those underlying exceptions in selected sectors: air transport, land transport, water transport, fisheries, professional services and telecommunications services. The Group also addressed briefly some additional issues raised by delegations: de facto discrimination, reciprocity and agencies or companies designated as sole suppliers of specific services.
2. The meeting was useful to delegations in clarifying the scope, content and application of these country exceptions, including the scope they would allow for the adoption of new non-conforming measures. It also proved useful in identifying the possible need for common approaches for addressing certain issues.
3. The major value of the meeting was in the mutual learning process. The points made in the attached memoire were considered worthwhile recording.
4. Delegations were invited to revise their country submissions in light of the outcome of the discussions.
5. The Group considered that it would be useful to pursue the technical work on country specific exceptions at both bilateral and multilateral levels.
6. The Group could be reconvened in March if the Negotiating Group so wishes.

Chairman

## ANNEX

### **AIDE MEMOIRE OF THE MEETING OF THE TECHNICAL GROUP ON COUNTRY SPECIFIC EXCEPTIONS HELD ON 21-23 JANUARY 1998**

1. The major value of the meeting was in the mutual learning process. In addition, the following points were considered worthwhile recording.

#### **Scope of the MAI**

2. The need for some country exceptions is closely linked to the coverage of definition of an investor and its investments under the MAI. It was pointed out that examples of this occur in the case of allocation of traffic rights for air transport and fishing quotas, especially in relation to what falls within the definition/coverage of an asset .

3. The difficulty of establishing a clear dividing line between investment and cross-border operations in some cases (port services, groundhandling) raises similar issues.

4. Some delegations were prepared to take a broad approach on these matters, relying on exceptions to deal with particular issues without revisiting the definition of investment. Other delegations were more reserved.

5. One delegation noted that its decision not to lodge a specific exception on the allocation of fishing quotas was predicated on the assumption that the general issue of the management and conservation of natural resources falls outside the scope of the MAI . Another delegation concurred that this matter requires further examination.

#### **Bilateral and other sectoral agreements**

6. The existence of bilateral and other sectoral agreements and the departures from MFN treatment and National Treatment built-in to them were recognised to be a dominant concern regarding certain activities in the fields of air transport, fisheries and to some extent water transport. Several delegations considered it necessary to retain flexibility with regard to the evolution of the treatment of MAI investors and their investments under these agreements. Some delegations felt that it should be possible to elaborate a common generic solution . Other delegations considered that the problem could be taken care of in the context of country exceptions. One view in this latter respect was that the inclusion of country exceptions to MFN treatment in the existing lists might be sufficient to protect the MAI Parties concerning future actions under bilateral agreements. Other delegations considered that this may need to be done by means of separate lists of exceptions governed by specific rules (National Treatment, MFN...).

7. It was pointed out that the adoption of a common solution to National Treatment/MFN concerns resulting from bilateral or other sectoral agreements would not necessarily prevent MAI parties from locking in existing treatment with respect to other measures affecting the same sector (such as the level of foreign equity participation). Some delegations have already done this in their country exception lists.

8. A few delegations wondered how the issue of temporary liberalisation might be addressed. It was noted that one variant of this had been raised and was under discussion in DG3.

### **GATS**

9. Several delegations suggested that the structure of the MAI should be flexible enough to permit countries to mirror their GATS commitments in the MAI while allowing those countries willing to go beyond these GATS commitments to do so. Some delegations noted that even a mirroring of their GATS commitments in their country exceptions to the MAI would result in a higher level of commitment because of the MAI's investment protection obligations and the difference in scope and coverage of the dispute settlement provisions of the MAI and WTO Agreements.

Another issue is how to reflect GATS commitments in country exceptions. Some delegations noted that if country exceptions are not taken in areas where MAI Parties have undertaken specific commitments under the GATS, then the MAI commitments will flow to all WTO members by virtue of the MFN obligation in the WTO.

### **Government Procurement**

10. One delegation considered that government procurement would fall outside the scope of the MAI. Many other delegations considered, however, that some aspects of this field -- for example, procurement based on the nationality of the producer (as opposed to the origin of the goods) were directly relevant to the treatment of investors and their investments. The link to the Performance Requirements and Monopolies articles needs further consideration.

11. Some delegations indicated that they wish to retain full flexibility regarding their rights and obligations under the WTO Government Procurement Agreement. It was suggested that a generic solution to this matter might be worth considering.

### **Subsidies and Grants**

12. A number of delegations have lodged open-ended country-specific exceptions on the granting of subsidies, grants or other incentives programmes. In other cases, the scope of country exceptions is more limited (for example a residency requirement).

13. Ongoing discussions on special topics are also relevant. In the view of many delegations, this matter is linked, in particular, to the provisions on performance requirements (notably in connection with R&D). The WTO has disciplines on subsidies which are relevant to certain performance requirements covered by the MAI (namely export requirements, local content and domestic preference requirements). Their implications are under examination in the "Special Topics" Group.

14. The Group also took note that the treatment accorded by some countries is governed by reciprocity considerations.

### **Prior Approval/Notification Procedures**

15. A number of clarifications were provided on prior cross sectoral approval/notification requirements found in country exceptions.

16. A number of delegations felt that the impact of prior approval procedures may be underestimated by the small number of authorisation denials observed in practice since the existence of such approval mechanisms may bias the original investment plans of investors, even those that are approved.

17. Some delegations noted that some of these measures actually amount to formalities and information requirements. One delegation suggested the inclusion of a special provision in the MAI on these special formalities.

### **National Security/Public Order**

18. A few delegations indicated that some of the measures they maintain in the field of telecommunications and transport services are motivated by national security or public order considerations and, for that reason, have not submitted country exceptions pending the outcome of the Negotiating Group deliberations. These delegations, and any other delegations maintaining the same types of measures, were encouraged by others to report them for the sake of transparency. This would be without prejudice to their eventual treatment under the MAI.

### **Special topics**

19. Some delegations announced some amendments to their lists, for instance to record non-conformity of measures with regard to special topics disciplines, such as performance requirements and nationality requirements for executives, managers and members of boards of directors.

20. With regard to performance requirements, delegations withheld their judgement on the need to lodge country exceptions with respect to state equity participation requirements (e.g. “joint ventures” that result when investors are allowed into sectors where the government owns some or all of the assets) on acknowledgement that separate informal consultations are continuing on this topic (“special topics”).

21. Some delegations confirmed the existence of monopolies in respect of some of the activities reviewed. This explains the absence of country exceptions in some cases.

### **Key Personnel**

22. Some delegations noted that some aspects of the obligations on key personnel are still under discussion. The nature of some of the envisaged provisions (e.g. the chapeau to paragraph 1 of the article on temporary entry, stay and work of investors and key personnel) may do away with the need to lodge country-specific exceptions. The Group recognised that the question of the issuance of work permits relates to the generic issue of special formalities. Account may also need to be taken of regional labour agreements.

23. Some delegations indicated that they have not finalised their position on professional services.

## **Privatisation**

24. While the text on privatisation obligations is not quite final, Delegations that have not yet done so were encouraged to submit exceptions they feel are needed.

25. The Group noted that the exceptions proposed so far by several delegations would allow the authorities to adopt or maintain future measures relating to privatisation. In some, but not all cases, the degree of discretion allowed to the authorities is codified by existing law. This is another area where a separate category of country exceptions may be appropriate.

26. In reviewing their exceptions, delegations are encouraged to specify any applicable laws and the scope they provide for introducing discriminatory measures in the future. It would be helpful to indicate whether, in addition to primary transactions, the secondary transactions concerning privatised enterprises are also covered by the exceptions.

## **Professional Services**

27. One delegation considered that the subject of professional services falls outside the scope of the MAI. Most delegations, however, were of the view that the provision of professional services by means of establishment was covered. Several of these delegations indicated that they were still working on the formulation of their country exceptions, taking account of the conclusions of the informal consultations on this subject.

28. The definition of professional services raises some issues. As a top down Agreement, it would be desirable that countries list their non-conforming measures by individual professions.

29. It was confirmed that the existence of nationality and citizenship requirements for professional licences and/or the provision of certain services - which appear to be a common feature of this field - require the lodging of country exceptions. These exceptions may require further scrutiny to ensure harmonisation in their presentation. It was also recalled that the question of whether recognition arrangements were consistent with the MFN principle had been debated in other fora, such as the GATS, where views remained divided over the issue.

30. One delegation raised the question of whether tuition fees based on nationality falls under the scope of the MAI, thereby requiring exceptions in the event of discriminatory treatment. Some delegations felt that this issue was not relevant to the treatment of an investor or its investments. Others were unsure.

## **Dispute Settlement**

31. Some delegations have proposed exceptions to the Dispute Settlement provisions of the MAI. The Group heard that in some cases their retention may depend on the nature and scope of these dispute settlement provisions. Many delegations questioned the technical necessity of lodging country exceptions on Dispute Settlement if the country exceptions already applied to the obligations on National Treatment, MFN, Performance Requirements or Nationality Requirements for Executives, Managers and Members of Boards of Directors.

### **“De Facto Discrimination”**

32. The Group discussed the appropriate treatment of a subsidy policy favouring small and medium sized enterprises (SMEs) on the basis of a non-paper [DAFFE/MAI/EX/RD(98)1]. Some delegations noted that such policies were common in many countries and that most other countries do not propose exceptions. Other delegations, while not necessarily disagreeing with this view, suggested the situation might not be so clear-cut and a determination of whether such measures were consistent with National Treatment would depend on the specific circumstances.

33. Some delegations considered it very difficult to make general rules to deal with de facto discrimination. Some delegations suggested that the MAI negotiations provided an opportunity to resolve an issue that had not been clarified to-date. Some other delegations suggested that while a precise test would not be feasible, the MAI might be able to provide guidance on this important issue.

### **Agencies or Companies Designated as Sole Suppliers of Specific Services**

34. The Group considered several examples submitted by one Delegation of agencies or companies designated as sole suppliers [DAFFE/MAI/EX/RD(98)2]. Most delegations took the view that the examples given would be regarded as monopolies and should be notified under the proposed monopolies article.

35. Delegations thought that the monopolies provision would prevail in the event of any conflict with the notification in paragraph 1(c) of the Performance Requirements article.

36. Delegations agreed to consider further the implications of the examples cited in the above country contribution and the possible implications for similar cases exist in their own countries.

### **Reciprocity**

37. One delegation noted that the various reciprocity measures that had been reported as derogations from MFN treatment, involve different tests (mirror reciprocity, equal competitive opportunities, effective market access) and wondered how these tests would be interpreted. It was recognised that this would be one aspect of the examination of a dispute by a panel.

38. It was noted in addition that many of the reciprocity exceptions reported were found in the financial services area and that as a result of the recent WTO Agreement, their number may be substantially reduced.

### **Harmonisation and Transparency of Country Exceptions**

39. Delegations were invited to revise their country submissions in light of the outcome of the discussions.

40. It was recognised that the voluntary addition of an industry classification element to the description of country exceptions would be welcomed, as recommended by DG3.

41. The Group recalled that, wherever possible, country specific exceptions should refer to the relevant law and other legal authority which would define the scope of the exception. This would contribute to the clarity and comparability of country exceptions.

42. The Group felt it would be desirable to be as specific as possible in the “description of the measure” in country specific exceptions and, where relevant, to identify any particular activities in a sector which would be affected by the exception concerned. One delegation gave an illustrative example of how this could work: in the field of maritime transport, if the restriction concerns requirements for the right of flag/registration, and registration is required in order to perform cabotage services, then “maritime cabotage” could be identified as a restricted activity.