



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

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Mr. Chairman,

1. We had a useful discussion on the latest lists of exceptions. Countries have indicated that their lists are still being reviewed domestically and can not yet be considered final. This process can not be finalised until the text is completed.
2. We based our discussions on working documents in which the existing exceptions were divided into sectoral and cross sectoral groups. The sectors considered were as follows: communications/media, energy/mining and financial services.
3. The cross sectoral issues discussed were: subnational measures, privatisation, key personnel, social services and bilateral investment agreements.
4. Not all entries were considered in detail.
5. Some specific information was sought in relation to particular exceptions. Clarifications in this respect will continue bilaterally.
6. Points of general interest have been recorded in the attached Aide Memoire which has been prepared under the Chairman's responsibility.
7. Some countries highlighted particular general issues.
8. The Group considered that it would be useful to pursue the technical work on country specific exceptions at both bilateral and multilateral levels.
9. Notwithstanding previous guidelines issued by the Chairman of the Negotiating Group [DAFFE/MAI(97)29], there are still difficulties in the finalisation of lists and in the assessment of the balance of commitments. The attached (which is not necessarily a complete list!) were mentioned in the course of our discussions and seem worth bringing to the attention of the Negotiating Group. They are issues in respect of which delegations need further guidance before finalising their lists.

Chairman

I. Issues identified at the March meeting where further guidance is needed.

**Raised in discussion of
(but may be of general interest)**

Issue raised include the following:

Communications/Media	Broadcasting Quotas: are they performance requirements?
Energy/Mining	Concessions - obligations need to be finalised Monopolies - obligations need to be finalised Pre and Post establishment: is the text clear enough regarding pre-establishment? Residency and incorporation requirements: do these need exceptions? Formalities: does the text need a “formalities” article?
Social Services	Government Services: are they exempt from MAI obligations ?
Privatisation	Obligations need to be finalised notably with regard to local governments and municipalities
Bilateral Investment Agreements (BITs)	MFN

II. Issues identified at the January meeting where further guidance is needed

Scope of the MAI within the definition	Allocation of air traffic rights and fishing quotas: are they within the definition of assets?
Bilateral and other sectoral agreements	Relationship to MFN and standstill
GATS	Relationship with MAI
Government Procurement	Relationship with the GPA Link to Performance Requirements
Telecommunications:	Scope and interpretation of national security/public order general exceptions.

**AIDE MEMOIRE OF THE MEETING OF THE TECHNICAL GROUP ON
COUNTRY SPECIFIC EXCEPTIONS HELD ON 16-17 MARCH 1998**

1. The discussion in the Technical Group continued to be valuable in increasing the understanding of country specific exceptions. The following points were considered worthwhile recording.

Communications/Media

2. Delegations with references to general cultural concerns were asked to specify the particular sub-sectors where their concerns lay. It was recognised that broadcasting quotas might require exceptions to the Performance Requirements article, particularly in respect of domestic content requirements. It was also suggested that measures not based on nationality requirements would appear to be consistent with regard to the National Treatment obligation.

Energy/Mining

3. Some countries have not finalised their exceptions in these sectors because they are awaiting the outcome of the discussions on concessions and monopolies.

4. A more general query was raised regarding pre and post establishment. Some delegations considered that although the MAI covers both pre- and post- establishment, it would be helpful to be more descriptive in exceptions to indicate any distinction between pre and post establishment. However, other delegations were of the view that the pre establishment issue went beyond the drafting of exceptions and needed to be clarified in the text of the agreement.

5. Several delegations also considered it desirable that the Negotiating Group clarify generally the treatment of residency and incorporation requirements under the MAI since these requirements would not in themselves appear to lead to actual discrimination against foreign investors and their investments. It was recalled that one of the guidelines proposed by the Chairman of the Negotiating Group for lodging country specific exceptions specifies that investors should be permitted to establish investments in any form (e.g. branch, subsidiary) which are permitted to domestic investors [DAFFE/MAI(97)29]. This issue also seemed to be relevant to that of inclusion into the MAI of a possible provision, mentioned by several delegations on "Special Formalities".

Subnational measures

6. Not all federal states have yet provided details of exceptions at subnational level. They were asked to provide as complete information as possible. Some delegations asked for reassurance that all “major” non-conforming measures had been identified. This would contribute to the process of assessing the overall balance of commitments and rights and obligations in the MAI.

Social services

7. A few countries have drafted “List B” exceptions in this area. More clarity has been requested as to the implications for private investors.

8. Other delegations are considering whether they too need exceptions. Some delegations shared the view that in this case four issues arise. Firstly, services may be provided by government. A number of delegations said that an exception would not be appropriate in such cases.

9. Secondly, services may be procured by or “contracted out” by government. Such cases are relevant to government procurement in general.

10. Thirdly, services may be provided by private investors. Clarification was sought about the potential effect in such cases of an exception.

11. Fourthly, the government provided services may be privatised in the future. The general issue of privatisation - and associated exceptions - is relevant in this case.

12. One delegation thought that the four issues characterisation of social services exceptions was not entirely relevant to the exceptions in some cases and in others focused on issues that may be outside the scope of the Agreement. It also felt that delegations would have to ensure that their flexibility regarding social services prerogatives and practices were fully protected by their country specific exceptions should they so desire.

Privatisation

13. A question was raised regarding privatisation by local governments and municipalities. It was suggested that such privatisation would be subject to the MAI disciplines to whatever extent subnational authorities are covered by the Agreement.

Europe Agreements

14. The specific exception lodged by one delegation with respect to the Europe Agreement prompted requests for clarification.

15. It was indicated by some delegations that the absence of an exception with regard to National Treatment unequivocally guarantees National Treatment to MAI investors. Questions remained about the effect of the Europe Agreement on MFN commitments in cases where a national treatment exception is taken. Some delegations noted that this issue was a particular example of the interface between the of MAI and bilateral agreements.

Key Personnel

16. In response to a written enquiry on the scope of the Key Personnel article, it was indicated that conditions of entry in national immigration laws, including a reciprocity requirement, other than labour market or other economic tests or numerical restrictions would not be inconsistent with the article since they are covered by the chapeau to paragraph 1. Denial of entry for reasons relating to labour market economic needs tests or numerical restrictions, including a related reciprocity requirement would, on the other hand, be inconsistent with the obligations of paragraph 2 of the Key Personnel article.

17. In addition, delegations generally regarded the one year prior employment requirement in paragraph 1(a)(ii) of the Key Personnel article to cover inter alia the duration of employment by the same investor in one of its enterprises, namely the parent company or one of its affiliates.

Financial services

18. The exceptions in this area are still under review. Some exceptions based on reciprocity have been earmarked for deletion but will be retained pending ratification of the results of the GATS negotiations on Financial Services.

19. The question was asked whether exceptions based on prudential concerns were required given the prudential carve-out. Some delegations have withdrawn these exceptions on the basis that they would be able to rely on the prudential carve-out. Others are still considering this matter.

Bilateral Investment Agreements (BITs)

20. The question was raised as to whether an exception to MFN would be in order to prevent an automatic extension of preferential treatment provided by BITs to MAI Parties. The issue of the extension of MAI to non-MAI Parties to BITs was also raised.

National Security/Public Order

21. Delegations were asked to provide details on any existing restrictions they believed were covered by the general exceptions on national security/public order. One delegation provided this information at the March meeting. Further clarification can be given bilaterally.