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

**LIBERALISATION AND EXCEPTIONS -  
THE INTERFACE BETWEEN MAI AND GATS**

**(Note by the Chairman)**

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1. The proposed MAI covers a number of areas which are also covered by the WTO General Agreement on Trade in Services. In the introductory remarks to their draft lists of exceptions, many MAI countries have stressed the need to further consider the relationship between the MAI and the GATS<sup>1</sup>. One of the questions which arise in this context concerns the interface between MAI country-specific commitments on investment and commercial presence obligations under the GATS.

2. The present note examines ways and means to deal with the overlap from the viewpoint of lodging exceptions. The following objectives should guide the consideration of legal techniques aiming at ensuring a smooth interface between the two agreements:

- (i) Capture the results achieved in GATS negotiations
- (ii) Maximise liberalisation commitments in the MAI, while preserving countries' future negotiating positions in the GATS

3. In its coverage of investment, the MAI is broader than the GATS, since it applies to all economic sectors, including the eleven categories of non-governmental services covered by the GATS<sup>2</sup>.

4. Moreover, the MAI defines countries' obligations through a top-down, rather than a bottom-up approach. In the GATS, only MFN and transparency obligations apply to all sectors, while National Treatment and Market Access obligations exist only where parties explicitly inscribe a sector/subsector in their schedule of commitment.<sup>3</sup> The MAI obligations - National Treatment, MFN, Performance Requirements etc. - all apply across the board, unless specifically limited for a given sector through a party's list of exceptions, or if subject to a general exception in the Agreement.

5. The MAI contains an additional feature, the "ratchet mechanism" designed to achieve progressive liberalisation automatically over time. This means that, where a restrictive measure appearing in a country's list of exceptions has been liberalised, the party's obligations under the MAI adjust automatically. Under the GATS, obligations remain those defined in the schedules of commitments, even if a country has undertaken liberalisation measures. As a consequence, whereas liberalisation can be taken back under the GATS, it is locked in under the MAI.

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1. Annex I to Note DAF/MAI(98)13 entitled "Departures from Standstill" analyses the relevance of the GATS to the MAI from another angle: How does the GATS apply the standstill principle, and what ideas could provide inspiration for treatment under the MAI of exceptions to standstill in the eight areas listed in the Chairman's Note DAF/MAI (98)5?

2. However, unlike the GATS, the MAI as an investment agreement does not contain obligations regarding the cross-border provision or consumption abroad of services, except where required to ensure non-discriminatory treatment of [established] foreign investors.

3. Even for sectors inscribed in a country's schedule of specific commitments, the standstill obligation is not absolute; Article XXI GATS allows for withdrawal of any commitment, while giving to other parties an entitlement to compensation. A text of this nature for IMF obligations is already part of the Consolidated Text.

6. **Objective (i)** - capture the results of GATS negotiations - is a straightforward one. It can be achieved by relatively simple means. MAI parties may need to screen their proposed MAI exceptions against their schedule of GATS specific commitments. They will want to ensure that none of the proposed exceptions would involve a backtrack on their existing obligations under the GATS. If necessary, draft exceptions may have to be reworded.

7. What happens, if a case of inadvertent backtracking is overlooked? In accordance with international law, the parties' intent is decisive. Given countries' resolve to preserve GATS liberalisation, any further-reaching obligations under the GATS would prevail. In order to avoid any doubt, countries could, however, consider an explicit text in the agreement stating that:

"Nothing in this agreement shall be construed as reducing parties' obligations under WTO agreements"<sup>4</sup>

8. **Objective (ii)** requires balancing of the need, expressed by some countries, to preserve their position in future GATS negotiations against the generally accepted aim of maximising liberalisation commitments under the MAI. This consideration is relevant in cases where MAI countries' proposed lists of specific exceptions imply the acceptance of commitments under the MAI which would go beyond those accepted under the GATS.

9. The comparison of countries' proposed MAI exceptions to their GATS schedules shows in some cases that limitations of commitments appearing in GATS schedules are not reflected through corresponding country exceptions to the MAI. This may be the result of a country's willingness to go beyond its GATS commitments. It may reflect new, unilateral liberalisation which has occurred since the conclusion of the GATS, or lock in a standstill commitment for previously existing legislation which the country concerned had not been willing to bind in the GATS.

10. For many countries, the comparison also shows that in certain sectors/subsectors, which were not inscribed in their GATS schedule, no or limited exceptions have been proposed to the MAI. Here, the difference between bottom-up and top-down approach would work to make their MAI obligations stronger than their GATS commitments. This is so because, contrary to the GATS, a sector which is not mentioned in a MAI party's list of country specific exceptions is subject to full application of all MAI obligations.

11. If liberalisation obligations are more advanced under the MAI in areas of overlap with the GATS, third countries could claim the benefit of such commitments via the GATS MFN provision, except where MFN exceptions have been inserted in the GATS. Countries may have decided to liberalise erga omnes, being aware that such unilateral liberalisation would be taken into account in future liberalisation rounds when establishing the overall balance of commitments, in accordance with GATS Article XIX, paragraph 3.

12. Nevertheless, some delegations have indicated that they will need to carefully consider in which sectors unilateral liberalisation could adversely affect their position in future GATS negotiations. How the balance of objectives is struck will in the end depend on each country's priorities, as well as on the issue or sector concerned

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4. A text of this nature for IMF obligations is already part of the Consolidated Text.

*Questions:*

- 1. Do Delegates agree with the analysis of the interface between GATS and MAI commitments?*
- 2. Do Delegates consider it necessary to insert into the MAI an explicit provision on WTO obligations, as proposed in paragraph 7?*
- 3. With respect to the approach set out in paragraphs 8 to 12, do Delegates consider this constitutes a sufficient basis for lodging exceptions in areas of overlap with the GATS?*