



Negotiating Group on the Multilateral Agreement on Investment (MAI)

LIBERALISATION AND THE LODGING OF COUNTRY SPECIFIC RESERVATIONS

(Background Note by the Secretariat)

LIBERALISATION AND THE LODGING OF COUNTRY SPECIFIC RESERVATIONS

(Background note by the Secretariat)

I. Introduction

1. The subject of liberalisation and the lodging of country specific reservations has been a recurrent theme of discussion in the Negotiating Group over the past several months. It has also been the object of bilateral consultations. At the May 1997 meeting, a large number of delegations felt that that it would be useful to engage in a horizontal discussion of the preliminary lists of reservations submitted by delegations while continuing bilateral discussions in parallel see item 7 of DAFFE/MAI/M(97)5].

2. It was felt that such plenary discussions could take stock of the various country reservations formulated so far, review the working assumptions on which they have been based and review questions encountered by delegations in preparing their own submission or comparing them with submissions of other delegations. They could also attempt to resolve generic or technical issues raised orally or in writing by delegations and which may not have been fully addressed by the Chairman notes on the liberalisation and the lodging of country specific reservations.

3. The present Note is designed to provide background for such a discussion. Part II provides a factual account of the reservations by looking at their number, nature (horizontal or sectoral), areas or activities and level of application. Part III underlines commonalty and significant differences in delegations' working assumptions. Part IV identifies discrepancies of formatting and presentation. Part V comments on generic issues found in the submissions.

II. Stocktaking

4. All thirty delegations have now submitted their preliminary list of reservations which are reproduced in DAFFE/MAI/RES(97)31 and DAFFE/MAI(97)5/REV1.

5. The statistical account which follows can only be viewed as a very tentative and approximate one. Beyond the preliminary character of the various country inputs, there are striking methodological differences. The activity or sectoral coverage of reservations vary and this can make country comparison hazardous. The proportionality/economic importance of reservations is not necessarily reflected in their number. Harmonisation questions concerning country presentations are discussed in section IV below.

6. The total number of reservations comes close to 550 reservations. About 15 per cent of them concern horizontal measures of one kind or another (authorisation or screening procedures for certain kinds of investment or investors, restrictions on real estate, nationality or residency requirements for key personnel and/or senior management and boards of directors, restrictions on the granting of grants and

subsidies or government procurement, reservations for privatisation or demonopolies). The remaining reservations concern sectoral measures.

7. The great majority of sectoral reservations are concentrated in the area of services (over 80 per cent or a total of 374 reservations). By descending order, they show the following distribution: transport (air transport, water transport and road transport), 36 per cent; financial services, 17 per cent, communication (broadcasting, telecommunications, media including audio-visual works), 14 per cent. Professional and business related services also show a high ratio of reservations for those countries which have reported measures in this sector, but they represent only a minority of countries.

8. Energy (exploration and exploitation of oil and gas, hydroelectric and nuclear power) has the major concentration of reservations in the non-services area (10 per cent of the total) followed by fish and fish processing and mining. Reservations on manufacturing have been reported by only five delegations.

9. In a great majority of cases, reservations pertain to measures at the central governmental level but they also refer, where appropriate, to supra- as well as subnational governments. Relevant state or local governmental measures are, explicitly or implicitly (no special carve-out), covered by all but two submissions; two additional countries have formulated a scrutiny reserve for territorial dependencies. In one instance, all existing state and localities non-conforming measures have been grandfathered.

10. Most of the reservations apply to the obligations of National Treatment and Most Favoured Nation Treatment. Some delegations have lodged reservations on special topics and particularly key personnel and performance requirements. As a general rule, however, the subjects of privatisation, demonopolisation or monopolies and concessions have been left out of the submissions. Three countries have entered reservations to MFN treatment accorded under all existing and future international agreements with respect to aviation, fisheries, maritime matters, including salvage or telecommunications transport networks and telecommunication transport services.

11. There are no phase-out liberalisation commitments except those agreed by new Members as part of their accession to OECD.

III. Working assumptions

12. The letter sent last February by the Chairman of the Negotiating Group on the lodging of country-specific reservations suggested that reservations be based on a top down approach (*i.e.* all non-conforming measures shall be listed) and be as narrowly defined as possible. It also proposed a standard presentation for the reservations.

13. In most cases these guidelines have been followed and most of the draft reservations reflect existing non-conforming measures. In some cases, reservations are broader and protect existing measures as well as future regulatory developments. In all instances, however, the reservations are predicated on certain working assumptions which correspond to the state of the elaboration of the MAI, specific country negotiating objectives, or both.

14. The most widely shared assumption on the MAI is that it would contain a broad asset-based definition of investment and general exceptions for reasons of national security. It also generally recognised that the draft list may need to be amended as the negotiations progress, and in particular, with respect to "special topics" and intellectual property rights. In addition, practically all delegations reserved their position with regard to the relationship between the MAI and the GATS (notably with respect to financial services and telecommunications).

15. More specific assumptions, or in some cases, statements of negotiating positions, concern, *inter alia*, the REIO clause, public order, culture, taxation, indirect investment, *de facto* and *de jure* discrimination and dispute settlement, some countries requested a clarification on the status of the Nordic Common Labour Market.

16. All delegations have reserved their position for the further assessment of their own legislation and further related development during the negotiations.

IV. Technical issues

17. A number of presentational differences may also be observed from the various country submissions.

18. One striking difference is the order of presentation of the reservations. Horizontal measures or measures applicable to all sectors can appear at the beginning or the end of the submissions. Sectoral measures can be regrouped by major sectors of activity (primary, secondary, tertiary), by order of importance, or number (with services upfront). Some countries have followed the English alphabetical order.

19. Another major difference relates to the content of individual reservations. Some countries have chosen to list all measures related to a particular sector (for instance ownership of vessels, registration of flags, restrictions on cabotage, nationality of crews ...) under one single entry while other countries list separately each individual measure.

20. There are also differences in the identification of the obligations or articles of the MAI in which a reservation is taken. For example, reciprocity requirements have been reported to be inconsistent with National Treatment, MFN treatment or both. It is also possible that a measure may simultaneously be inconsistent with National Treatment/MFN and obligations on special topics. This is the case with joint venture requirements which, in view of the discussions so far, would require reservations to both the National Treatment and Performance Requirements articles. It is recalled that delegations have been invited to list all the articles pertinent to a particular reservation.