



Negotiating Group on the Multilateral Agreement on Investment (MAI)

**Drafting Group No.2 on Selected Topics Concerning Treatment of Investors and Investment
(Pre/Post Establishment)**

DRAFT ARTICLE ON GENERAL EXCEPTIONS

(Note by the Chairman)

Draft Article **

General Exceptions

- [1. This Article shall not apply to Articles** (on compensation for losses, and expropriation, and....)].
2. Nothing in this Agreement shall be construed:
 - a. to prevent any Contracting Party from taking any action which it considers necessary for the protection of its essential security interests including those:
 - (i) taken in time of war, armed conflict, or other emergency in international relations;
 - (ii) relating to fissionable and fusionable materials or the materials from which they are derived;
 - (iii) relating to traffic in arms, ammunition and implements of war and to such traffic in other goods and services as is carried on directly or indirectly for the purpose of supplying a military establishment.
 - b. to require any Contracting Party to furnish any information the disclosure of which it considers contrary to its essential security interests;
 - c. to prevent any Contracting Party from taking any action in pursuance of its obligations for the maintenance of international peace and security;
 - [d. to prevent any Contracting Party from taking any action necessary for the maintenance of public order.]
3. In accordance with Article**, such measures shall be notified to the [Parties Group] and shall be subject to the examination procedures provided for in Article**.
4. If a Contracting Party is of the opinion that measures or practices taken by another Contracting Party constitute a disguised restriction on investors or investment in contravention of this Agreement, it may request further clarification. The other Contracting Party shall co-operate to assess whether or not a measure or practice relates to the purposes identified in paragraph 2 and to provide the information as fully and quickly as possible through the appropriate responsible government channels, without prejudice to article 2 b.

COMMENTARY

1. In the light of the discussion in the Negotiating Group, the draft general exceptions provision has been narrowly drawn and made subject to procedures to control abuse. A single provision has been proposed so all the exceptions falling under this draft Article are subject to the same limits and controls.

Paragraph 1

2. It has been proposed that the general exceptions provision not be applicable to all of the obligations under the agreement. The ECT (Article 24(1)) is an example of a multilateral agreement that does not allow for national security exceptions to be taken with regard to specific obligations concerning compensation for losses, or expropriation. This would also correspond to the practice of most Member countries in their bilateral investment treaties which do not contain general exceptions clauses. Pending discussion by the Drafting Group, paragraph 1 is in square brackets.

Paragraph 2

3. This draft Article draws on the elements generally found in other multilateral agreements (NAFTA, GATS, ECT, OECD Shipbuilding agreement). Public order is in brackets since there is not yet a clear consensus on this issue.

-- subparagraph a

4. As drafted, this subparagraph follows the model in recent agreements (NAFTA, ECT, GATS) which do not define essential security interests but which provide examples clarifying the purpose of the provision. The Drafting Group might discuss whether the proposed language in (ii) and (iii) is pertinent in an investment agreement.

-- subparagraph b

5. This provision is found in recent agreements (NAFTA, ECT, GATS, OECD Shipbuilding). Provisions relating to the protection of information concerning law enforcement or public order measures would be covered by an article elsewhere in the agreement dealing with transparency requirements.

-- subparagraph c

6. The Negotiating Group indicated that scope might be needed to provide for measures to maintain international peace and security but which are not related to obligations under the UN Charter, for example for measures taken pursuant to regional security arrangements. The freezing of financial assets was cited as an example of an action which might need to be covered by a general exception provision of this kind.

7. The ECT is the only recent agreement which does not include a general exception provision referring to international peace and security obligations. Whenever these are included, the obligations under the UN Charter are specifically mentioned [OECD Shipbuilding agreement, GATS, NAFTA].

-- subparagraph d

8. NAFTA and the OECD Shipbuilding Agreement do not have a public order exception. Where public order exceptions are provided for, (e.g., the ECT and GATS) there are strict conditions limiting

their use. A footnote in the GATS specifies that the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

Questions

The Drafting Group might wish to examine whether the concerns relating to public order could be covered by a provision in the MAI, similar to Article 5 of the OECD Codes, which provides in part that .."measures of liberalisation provided for in this Code shall not limit the powers of Members to verify the authenticity of transactions or transfers nor to take any measures required to prevent evasion of their laws or regulations.."

If the Group agrees to put forward a public order exception, it might wish to include in subparagraph d) the requirement that such measures are not applied in an arbitrary or discriminatory manner, (GATS, ECT).

Paragraph 3

9. The present OECD instruments contain procedures which provide for transparency, consultation and peer review for national security measures aimed at limiting abuses and achieving greater consistency in the manner that Members apply the national security provisions. The Negotiating Group has suggested that these procedures might be adapted to the MAI. This paragraph provides that all measures taken under the general exceptions provision are nevertheless subject to the notification and examination obligations of the agreement. The articles on notification and examination might need to distinguish between general exceptions and other measures which are also subject to notification and review.

Questions

To assist in examination, would the Group propose that the Negotiating Group adopt an interpretation on essential security interests along the lines of the CMIT interpretation or the 1991 National Treatment clarification?

"...Measures taken for economic, cultural or other reasons should be identified as such and should not be shielded by an excessively broad interpretation of public order and essential security interests...."

Excerpt from Public order and essential security interests clarification. "National Treatment for Foreign-Controlled Enterprises", OECD Paris 1993.

Paragraph 4

10. Paragraph 4 foresees a graduated mechanism starting with the right of a Contracting Party which believes itself aggrieved by a measure taken by another Contracting Party to request clarification from the other Contracting Party (consultation). This might also include referral to a "Parties Group" which could act according to other procedures of the Agreement, relating, for instance, to review mechanisms (this possibility is provided by the Codes) or dispute settlement.