



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Expert Group No.5 on “Financial Services Matters”

DEFINITION OF “INVESTMENT” AND GENERAL SAFEGUARD PROVISIONS

(Note by the Chair)

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1. At its meeting on 18-20 December 1996, the Negotiating Group has given EG5 a new mandate to finalise advice to Drafting Group N° 3 (DG3) with respect to the definition of “investment”, and to consider the need for general safeguard provisions, particularly with respect to the balance of payments, taking account of the role of the International Monetary Fund.

2. At its last meeting, DG3 confirmed the basic structure of a broad and open-ended positive list of assets for the definition of “investment” and agreed that the negative list should be short and closed [DAFFE/MAI/DG3(96)3]. EG5 has been requested to finalise advice with respect to items of a financial character on the negative list.

3. At the same time, DG3 concurred with EG5 that the main concerns relating to a broad definition of “investment” were related to certain cross-border financial transactions by non-residents which may have implications for monetary policy, exchange rate policy and the balance of payment. Delegations called attention to the general safeguards identified by EG5 as possible solutions to address these concerns, while preserving a broad asset-based definition of investment. EG5 has been requested to finalise its advice on the possible need for safeguard provisions in the MAI.

1. Definition of items of a financial character (negative list)

4. Items of a financial character currently under consideration for possible inclusion in the negative list for the definition of “investment” include, in addition to public debt, “financial assets” and derivatives where the underlying asset is not regarded as an investment (see new text and consolidated commentary in Annex A to this Note).

5. “Financial assets” is meant to be merely a place holder to cover any financial assets that it might be felt desirable to include in the negative list. The term “financial assets” is a potentially very broad item; it can include, for instance, shares, debt securities, liabilities arising from financial credits, bank accounts and currencies. Derivatives, including derivatives which are not based on an underlying investment in the sense of the MAI, are also other forms of financial assets.

6. At the December meeting of EG5, it was generally agreed that it would be very difficult in practice to make a distinction between different kinds of derivatives and other financial assets with respect to motivation, for example whether for purposes of hedging or speculation. It was also recognised that it would be difficult to make a judgment as to the intrinsic value of different investments. The question of fairness in the treatment of different investors was also raised.

7. Moreover, the inclusion of certain derivatives and other financial assets in the negative list would imply that none of the provisions of the MAI, in particular regarding transparency, MFN and protection of assets lawfully acquired by non-residents, would be applicable to them, although concerns relate in fact primarily with the application of the National Treatment obligation to cross-border

transactions in such assets. It might be possible to more specifically address these concerns elsewhere in the MAI, through, for instance, appropriate safeguard provisions.

In light of these considerations, does the Group consider that, so long as appropriate solutions to address concerns with certain cross-border financial transactions can be found elsewhere in the MAI, there is no need to include items regarding derivatives and other “financial assets” in the negative list?

2. General safeguards

8. At the December meeting of EG5, the introduction of general safeguards, such as a balance-of-payments derogation clause, a carve-out (exception) for the activities of the central banks and other monetary authorities, or an exception to National Treatment for the acquisition or sale of specific assets, was identified as a potential solution to address concerns with certain cross-border financial transactions, while maintaining a broad definition of investment, in particular as a possible alternative to the inclusion of items on derivatives and other “financial assets” in the negative list.

a) Balance of payments

9. OECD Member countries are strongly attached to the freedom of investment and capital movements more generally as well as to the right of investors to freely make payments and transfers in connection with current and capital transactions. They have traditionally discouraged recourse to exchange restrictions and capital controls as a means of solving balance-of-payments problems, stressing that they should not be a substitute for appropriate adjustment policies. Nevertheless, it may be considered that there could exist exceptional circumstances in which a country should have the flexibility to introduce such restrictions for a temporary period if this can allow the country to buy time until appropriate policy measures take hold. This may be especially important in the context of adjustment policies adopted with IMF support.

10. Most bilateral investment protection treaties do not have safeguard provisions which allow a Party to take restrictive measures for balance-of-payments reasons. However, there are two important differences between the MAI and BITs: in addition to protecting existing investments, the MAI covers also cross-border flows of capital (initiated by non-residents); and it is a multilateral agreement. Therefore the operation of the MAI may have broader potential implications for the balance of payments of a Contracting Party than a BIT can have. This could argue in favour of some forms of safeguards for the balance of payments in the MAI.

11. With the exception of the Energy Charter Treaty, other multilateral agreements contain balance-of-payments derogation clauses (see Annex B to this Note).

12. Article XII of the **GATS** provides that a Member may adopt or maintain restrictions in the event of serious balance of payments and external financial difficulties, or threat thereof. It stipulates *inter alia* that the restrictions taken have to be non-discriminatory, consistent with the Articles of the Agreement of the IMF, no more severe than necessary, and temporary. Article XII also provides for various processes of consultations with the Member applying such restrictions to ensure they are consistent with the requirements of Article XII. In these consultations, although the Committee on Balance of Payments Restrictions of the WTO makes the final determination as to whether a temporary derogation is justified, the Committee’s conclusions should be based on the IMF’s assessment of the balance of payments and the external financial situation of the consulting Member.

13. It is understood by the IMF staff [see DAFPE/MAI/RD(96)35] that the Fund approval of restrictions on current payments and transfers is a sufficient condition for consistency with the requirements of Article XII of GATS. Article XI of the GATS (see Annex B) permits the imposition of restrictions on capital payments and transfers which have been imposed at the request of the IMF pursuant to Article VI of the Funds' Articles (in addition to the cases covered by Article XII).

14. At the meeting of the Negotiating Group on 11-13 September 1996, the IMF staff recommended that the MAI adopts provisions along the lines followed in Articles XII and XI of the GATS, with certain modifications relating to capital movements [see DAFPE/MAI/RD(96)35] .

15. It is understood that to the extent that restrictions applied for balance-of-payments problems are not consistent with the provisions of Article XII, they would be subject to the dispute settlement process provided under the Understanding on Dispute Settlement.

16. Article 2104 (see Annex B) of the **NAFTA**, in Chapter 21 on the general exceptions to the Agreement, recognizes the right of a Party to adopt or maintain measures that restrict transfers where the Party experiences serious balance-of-payments difficulties, or the threat thereof. It contains detailed provisions which set out the circumstances under which a Party may adopt restrictive measures for balance-of-payments problems. It is understood that whether the measures so imposed are consistent with each of the rules and requirements of Article 2104 can be subject to dispute settlement.

17. Article 7 c) of the **OECD Codes of Liberalisation** contains a derogation clause for serious balance-of-payments difficulties. Whether the invocation of such a clause by a Member country is justified is a matter for decision by the OECD Council upon opinion of the experts of the CMIT Committee (in which the IMF representative participates as an observer). Such invocation is subject to periodic review. The maintenance of restrictions is subject to specified time limits under Article 7 d).

18. In the context of the MAI, there is an agreement that the scope and effectiveness of the MAI should not be limited by an unnecessarily broad balance-of-payments safeguard clause and that abuse should be avoided. The Group may wish to consider the terms and conditions for recourse to a possible balance-of-payments clause in the MAI. Criteria could include the seriousness of the balance-of-payments difficulties or threat thereof facing the country concerned. Restrictions taken by a Contracting Party should also be temporary and should not discriminate among other Contracting Parties. In terms of procedure, invocation of the derogation clause and the restrictions concerned should be subject to notification and consultations, and could also be eligible for some forms of dispute settlement.

19. An important issue to be considered by the Group is the scope of the operations to be covered by a balance-of-payment safeguard clause in the MAI. Balance-of-payments difficulties generally refer to situations of capital flight and significant losses in foreign exchange reserves. Therefore a balance-of-payments clause would normally allow a Party to restrict transfers abroad, both current and capital transfers, thereby overriding the provision of the MAI on Transfers. There have been discussions at previous meetings of the Negotiating Group whether transfers relating to a particular category of investments (such as direct investment) and compensation payments arising from expropriation should in fact be covered by a balance-of-payments clause in the MAI; the Group may also wish to reconsider these questions.

20. Difficulties with the balance of payments, or at least serious threat, could arguably arise also from unsustainable large current account deficits associated with excessively large capital inflows. Therefore the Group may wish to consider whether it would be desirable that a balance-of-payments safeguard clause in the MAI covers also capital inflows.

21. Another important issue, which has already been raised within the Negotiating Group [see Note by the Chairman DAFPE/MAI(96)22 and Notes by the IMF staff DAFPE/MAI/RD(96)19 and 35], is the relation of a possible balance-of-payments safeguard clause in the MAI and the role of the IMF. Under Article VIII of the IMF's Articles, the IMF has jurisdiction over current payments and transfers (including moderate amounts of amortization of principal); in particular new restrictions in this field may be approved by the IMF for a temporary period for balance-of-payments reasons. The Group may wish to consider whether approval by the IMF of the introduction of new restrictions on current transfers and payments covered by Article VIII would be a sufficient condition for acceptance under a balance-of-payments safeguard clause in the MAI, as is provided for in the GATS.

22. Also, under Article XIV of the Fund's Articles, existing restrictions on current payments and transfers may be "grandfathered" until the balance-of-payments position of the country concerned is sufficiently strong. The Group may also wish to provide advice on how best to address under the MAI existing restrictions on current payments and transfers.

23. Regarding restrictions on capital movements, including payments and transfers, most of them do not fall within the jurisdiction of Article VIII of the IMF's Articles and do not have to be approved by the IMF. On the other hand, Article VI of the Fund's Articles provides that restrictions on capital payments and transfers may be imposed at the request of the IMF to protect the Fund's resources from being used to finance "large or sustained" capital outflows. (The Fund has never found it necessary to formally request a member to impose capital controls.) The Group may wish to provide advice on how best to address under the MAI capital controls imposed at the request of the IMF pursuant to its Article VI.

24. In considering the issues raised in paragraphs 21 to 23, the Group may wish to note that the Fund's jurisdiction might be extended in the future to cover capital-account items [see DAFPE/MAI/RD(96)35 on IMF's on-going work in this area].

25. Another issue is the scope of application of the dispute settlement provisions of the MAI with respect to invocation of a balance-of-payments derogation provision. A controversy may arise as to whether recourse to the derogation provision is justified. To the extent that approval is given by the IMF and/or the MAI Parties Group, there would be no scope for dispute settlement. A question may also arise whether a particular measure falls within the coverage of the balance-of-payments derogation provision once recourse to the derogation has been approved. This could be subject to dispute settlement but it is for consideration whether there should be a requirement for a prior opinion by the Parties Group/IMF or by a panel of financial experts acting under the authority of the Parties Group.

A. Does the Group consider that the MAI should contain a balance- of-payment safeguard clause?

B. If so:

- i) which one? Should it draw, for instance, on the GATS provisions?***
- ii) should it be subject to notification, consultation and/ or approval procedures?***
- iii) should it be subject to dispute settlement?***
- iv) what should the role of the IMF be?***
- v) should the adoption of a balance-of-payments clause in the MAI be considered as an alternative to the inclusion of items of derivatives and other financial assets in the negative list ?***

b) Other possible safeguards

i) Monetary and exchange rate policies

26. Paragraph 3 (b) of Article I of the **GATS** states that, for the purposes of the Agreement, “services” includes any services in any sector “except services supplied in the exercise of governmental authority”. The exception set out in this paragraph is further defined in the Annex on Financial Services. In paragraph 1 (b)(i) of the Annex, “services supplied in the exercise of governmental authority” include “activities conducted by a central bank or monetary authority or by any other public entity in pursuit of monetary or exchange rate policies”. Taken together, these two provisions provide that monetary and exchange rate policy activities are not subject to the obligations contained in any part of the Agreement. It is, however, understood that whether a measure taken is, in fact, a monetary policy measure or an exchange rate policy activity can be subject to dispute settlement.

27. Under paragraph 2 of Article 1410 of the **NAFTA** (see Annex B), monetary, related credit and exchange rate policies are removed from the obligations of Part Five of the Agreement (i.e. Chapter 11 on Investment, Chapter 12 on Cross-Border Trade in Services, and Chapter 14 on Financial Services) as long as they are non-discriminatory and of general application. In addition, such measures are subordinated to the obligations on the transfers provisions and performance requirements of the Investment Chapter. Article 1413 of the NAFTA directs that any Party may request consultations with any other Party regarding any matter arising under this Agreement that affects financial services. Thus, it is conceivable that consultations could be requested to discuss whether a particular monetary, related credit or exchange rate policy measure is, in fact, non-discriminatory and of general application¹.

28. Article 7 b) of the **OECD Codes of Liberalisation** contains a derogation clause for serious economic and financial disturbance. As for the balance-of-payments clause, whether the invocation of such a clause by a Member country is justified is a matter for decision by the OECD Council upon opinion of the experts of the CMIT Committee. Such invocation is subject to periodic review.

29. At the December meeting, one delegation made a proposal for text regarding a possible safeguard clause combining balance-of-payments and monetary/exchange rate policy considerations altogether, along the lines of Article 73f and 109i of the Maastricht Treaty [see proposed text in DAF/MAI/RD(96)51]. The proposed clause would also contain an “anti-abuse” provision, would be subject to dispute settlement and would possibly be confined to short-term capital movements.

30. In considering the need for a specific provision for the conduct of monetary and exchange rate policies in the MAI, the Group may also wish to take into account the extent to which a balance-of-payments safeguard clause in the MAI which would be applicable to both capital outflows and capital inflows would suffice to address concerns with respect to monetary and exchange rate policies.

¹ In the NAFTA, regarding *investor-to-state* dispute settlement, where an investor submits a claim for “investor-state” dispute arbitration against a Party and that Party claims that the matter at issue involves monetary, related credit or exchange rate policy, then the arbitration process is put on hold while the matter is referred to the Financial Services Committee to determine whether the measure is in fact one of monetary, related credit or exchange rate policy. If the Committee determines that it is not, then the arbitration procedure for investor-state dispute settlement may proceed. If it is determined that it is such a measure, then all dispute settlement proceedings cease. Regarding *state-to-state* dispute settlement, the parties themselves may question whether a particular measure is in fact one of monetary, related credit or exchange rate policy. In such a case, the dispute settlement provisions of Chapter 20 will apply.

Does the Group consider that the MAI should contain:

A. A specific provision for activities by the central banks and other monetary authorities, in addition to a possible balance-of-payments derogation clause?

B. If so:

- i) which one?*
- ii) should it be subject to dispute settlement?*

ii) General exception to National Treatment

31. Unlike the balance-of-payment derogation clauses or the carve-outs for monetary and exchange rate policies as described above the invocation of which may need to be justified, a general exception to National Treatment would provide Contracting Parties an unconditional right to restrict certain capital flows at any moment provided that the capital movements concerned fall within the list of instruments covered by the exception.

32. One delegation proposed a text for such possible exception to National Treatment which would allow a Contracting party to restrict the acquisition or sale by an investor of another Contracting Party of investments with an original maturity of less than one year [see DAFPE/MAI/RD(96)51]. The delegation suggested that the list of investments concerned might be drawn from the list of instruments in Annex II of the EEC Council Directive 88/361 of 1988 with respect to which protective measures could be taken by EC member states.

33. It is understood that such a provision is meant to only affect cross-border flows of capital, and not to dispense a Contracting Party with the National Treatment obligation regarding investment activities by foreign-controlled enterprises already established on its territory and more generally any of the MAI obligations, including transfers and protection, with respect to assets once invested in the host country. Clarification may, nevertheless, be necessary as to whether the application of the proposed exception to the “sale” of investments would cover the liquidation of investments lawfully made by a non-resident and the repatriation abroad of the proceeds.

Does the Group consider that the MAI should contain:

A. A general exception to National Treatment with respect to certain cross-border capital flows?

B. If so:

- i) which one?*
- ii) should it be a complement to, or a substitute for, safeguards with respect to the balance of payments and monetary/exchange rate policies?*

Annex A

Definition of Investment and Commentary (Extract from DAFFE/MAI/(97)1)

INVESTMENT MEANS:

- (a) Every kind of asset owned or controlled[,] directly [or indirectly,] by an investor, including²:
- (i) an enterprise (being a legal person or any other entity constituted or organised under the applicable law of the Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation);
- (ii) shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom;
- (iii) bonds, debentures, loans to and other form of debt [of an enterprise]³; and rights derived therefrom;⁴
- (iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;
- (v) claims to money and claims to performance^{5, 6};
- (vi) intellectual property rights⁷;
- (vii) rights conferred pursuant to law or contract [such as] or [by virtue of]⁸ concessions⁹, licenses, authorisations¹⁰, and permits¹¹.

² Pending final determination of the scope and content of the agreement, one delegation reserves its position as to whether the positive list should be open or closed.

³ Some delegations proposed to retain “of an enterprise” in order to clarify that debts of an enterprise are covered. DG3 agreed to retain this in brackets pending clarification of whether natural persons are to be included or excluded. If it decides to include natural persons it can do so explicitly by adding “and of a natural person” after the words “of an enterprise” or it can do so implicitly by deleting any reference to enterprise. If DG3 decides to exclude natural persons it might wish to reflect this on the negative list. Concerns relating to public debt would also be addressed via the negative list.

⁴ One delegation reserves its position item (iii).

⁵ Some delegations wish to verify the consequences of omitting the words “pursuant to a contract” at the end of item (v).

⁶ Some delegations wish to verify the consequences of omitting from item (v) the words “having an economic value” to determine the possible need to retain these words in the definition.

⁷ Several delegations have concerns relating to this item. One delegation proposed that literary and artistic works should not be included in the definition of investment.

⁸ If the words “such as” are retained, one delegation would wish to add the following two elements to the negative list:

- (viii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges,

[unless such assets lack the characteristics of an investment.]

- (b) "Investment" does not include^{12 13}:

[(i) public debt;] [debt securities of and loans to a state enterprise or Contracting Party;]

[(ii) financial assets;]

[unless the transactions [to which such debt or other assets relate] otherwise have the characteristics of an investment; or]

[unless the respective claims are assets of an enterprise mentioned in paragraph (a) (i); or]

[unless such assets are acquired for the purpose of establishing lasting economic relations with an enterprise; or]

[(iii) derivatives where the underlying asset is not regarded as an investment],

[(iv) real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purposes]¹⁴,

[(v) moveable or immovable property, and any related rights, acquired for personal use].

COMMENTARY

Investment

8. Drafting Group N° 3 examined a definition of investment on the assumption that the MAI would contain a single, broad definition covering all forms of assets, including tangible and intangible assets.

-- the granting of authorisations, licences and concessions for the prospection, exploration and production of hydrocarbons;

-- the licensing of fishermen, fishing vessels and equipment.

⁹ One delegation proposed that the term "concessions" may need to be defined, taking account of the substantive obligations to be agreed.

¹⁰ One delegation reserves its position on the inclusion of the word "authorisations".

¹¹ One delegation reserves its position on item (vii).

¹² Some delegations wish to retain for further consideration the idea that the negative list would not apply for purposes of expropriation and compensation and protection from strife and transfers.

¹³ A formula needs to be found to deal with the relationship between the MAI and obligations concerning international trade in goods and services. In this regard, one delegation referred to paragraph 34 of the Commentary on the Consolidated Texts [DAFFE/MAI(96)16/REV1]. Two other delegations prefer to retain on the negative list "claims to money that arise solely from commercial transactions including the extension of credit for the sale of goods and services".

¹⁴ One delegation wants a broader exclusion of real estate and proposes to replace this text by "real estate or rights associated with land".

The consideration of such a definition does not prejudice the scope of its application to the various MAI rights and obligations.

9. While the question of the scope and application of the MAI is still to be resolved, the Drafting Group made the following observations. There was consensus in favour of applying a broad definition with respect to the MAI obligations to protect existing investments; however, several delegations expressed concern over how the MAI obligation concerning national treatment would apply in the pre-establishment phase. Some delegations consider that an unqualified application of this obligation to a broad range of assets could interfere with regulations of financial markets and other operations which are not meant to be covered by the MAI. One delegation also considered that an unqualified application would cause confusion with respect to the precise contents of obligations in the pre-establishment phase.

10. To address this concern while maintaining a broad and single definition under the MAI, specific reservations could be lodged wherever a country is not in a position to fully accord national treatment or other MAI obligations.

11. The draft definition of investment defines investment in terms of assets and includes an illustrative list of assets so as to cover all recognised and evolving forms of investment. The definition would include the products of an investment.

12. DG3 agreed on the structure of the article on the definition of investment, i.e. a broad positive list and a limited negative list.

13. Some delegations are concerned that a broad definition of investment might result in a proliferation of dispute settlement claims. If necessary, this concern can be addressed by limiting access to the MAI dispute settlement mechanism, either through a provision in the dispute settlement article or through limitations in the definition itself.

14. Views differ on whether the definition of investment should cover investments indirectly owned or controlled by investors of a Party. Some delegations are of the opinion that covering such investment offers maximum protection to investors, including access to MAI dispute settlement. In addition, those delegations believe that this approach offers the most flexibility to investors in managing their capital flows, and avoids diverting investment flows from developing countries. The Group considered four cases:

- (a) investment by an investor established in another MAI Party, but owned or controlled by a non-MAI investor

(Example: an investment in Austria by a Belgian subsidiary of a non-MAI parent)

- (b) investment by an investor established in a non-MAI Party, but owned or controlled by a MAI Party investor

(Example: an investment in Canada by a non-MAI subsidiary of a Danish parent);

- (c) investment by an investor established in another MAI Party, but owned or controlled by an investor of a third MAI Party

(Example: an investment in France by a German subsidiary of a Hungarian parent); and

(d) investment in a MAI Party by an investment there covered by the MAI

(Example: an investment in Italy by an Italian subsidiary of a Japanese parent).

15. There was a broadly shared view that case (a) investments should be covered by the MAI. Most delegations favoured providing for certain exclusions in a denial of benefits clause which would permit, but not require, exclusion. Some delegations were concerned about possible abuse of this provision. It was suggested that the condition for exclusion would be where the MAI investor lacked substantial business activity in the MAI Contracting Party. One delegation suggested limiting this to cases in which the investor was constituted “for no other purpose than obtaining MAI benefits” (exact wording not finalised).

16. There was wide support for covering case (b) investments; however, whether to do so was considered a policy issue to be considered by the Negotiating Group.

17. Related to it was the question of standing for MAI dispute settlement on which the Negotiating Group might provide guidance to Expert Group N°1. Under investor-state proceedings, most delegations considered that only the parent MAI investor would have standing, but some delegations were open to allowing the intermediary entity to have standing as well. Under state-to-state proceedings, all delegations suggested, as a matter of principle, giving no standing to the non-MAI government of the intermediary.

18. There was consensus that case (c) and case (d) investments would be covered by the MAI. There was no further debate on the legal implications.

19. Related to each of these cases was the question of which entities and states have standing for MAI dispute settlement, an issue for consideration by Expert Group N°1. This includes which tier or tiers of investors have standing in investor-state dispute settlement and which MAI Party (state or states) have standing in state-to-state dispute settlement.

20. One delegation considered that the inclusion of indirectly controlled investments might pose serious problems to REIO Members states as far as their present level of liberalisation is concerned as this normally also applies to companies established in the REIO, but under control of a non-REIO country. The delegation suggested that such problems could eventually be effectively addressed by a general MAI provision on measures taken within Regional Economic Integration Agreements.

Item (i)

An enterprise (being a legal person or any entity constituted or organised under the applicable law of a Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation).

21. The term “enterprise” is defined in parenthesis in the proposed text but could be defined separately. It was agreed that the definition covers, inter alia, scientific research institutes and universities. Most delegations favoured the same definition of enterprise for “investor” and “investment”. It was also proposed to define “enterprise of a Contracting Party”.

Item (ii)

Shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom;

22. This item, as well as item (iii), includes portfolio investment and minority holdings. It is for consideration whether the definition covers strategic alliances and other arrangements involving know-how, intellectual property, or technology or the joint conduct of research and development programmes. This item is also understood to cover an interest in an enterprise that entitles the owner to share in income and profits of an enterprise and its assets. The extent to which the substantive obligations of the agreement will apply to this item and to item (iii), in particular portfolio investment and foreign exchange operations, will need further examination in the light of concerns expressed by some delegations.

Item (iii)

Bonds, debentures, loans to and other forms of debt [of an enterprise] and rights derived therefrom;

23. This item would cover loans of all maturities and debt securities of a state enterprise.

24. DG3 noted that the relation between this obligation and national legislation may need to be considered further. One delegation wishes to exclude loans of less than three years, other than loans between affiliates of an enterprise. Many delegations considered, however, that such an exclusion would be contrary to the objective of a broad definition. If there is no consensus on this issue it will have to be referred to the Negotiating Group.

Item (iv)

rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;

25. Some delegations wish to retain, for further consideration, a previous text for item (iv) which would read as follows:

“an interest arising from the commitment of capital or other resources in the territory of a Contracting Party to economic activity in such territory, such as under

- contracts involving the presence of an investor’s property in the territory of a Party, including turnkey or construction contracts, or concessions, or
- contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.”

Item (v)

claims to money and claims to performance

26. “Claims to money” includes bank deposits. Most delegations consider that this item covers derivatives which are not covered elsewhere in the list of assets.

27. Claims to money may also arise as a result of a sale of goods or services. These claims are not generally considered as investments. The NAFTA excludes such claims unless they are associated with the investment interests which are set out in its definition. The ECT also requires that these claims be associated with an investment. Similar questions arise with respect to “rights under contracts” (item iv).

28. Some delegations supported the following alternative text:

“Claims to money and claims to performance pursuant to a contract [associated with an investment] having an economic value, with the exception of :

- (a) Commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Contracting Party to an enterprise in the territory of another Contracting Party;
- (b) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by item (iii); or;
- (c) any other claims to money that do not involve the kinds of interests set out in items (i) through (ix)”

Item (vi)

Intellectual property rights;

29. All forms of intellectual property are included in the definition of "investment," including copyrights and related rights, patents, industrial designs, rights in semiconductor layout designs, technical processes, trade secrets, including know-how and confidential business information, trade and service marks, and trade names and goodwill. Views differed on whether it is necessary to specifically refer to some of these elements in the definition as part of the illustrative list of assets. Some delegations consider that “literary and artistic property rights” should not be included. One delegation wishes to cover intellectual property rights under the MAI only when acquired in the expectation of economic benefit or other business purposes.

30. Further work is necessary to clarify the relationship of the MAI to other international agreements that relate to intellectual property, particularly where these conventions might require standards of treatment which differ from the MAI or where these conventions provide for dispute settlement mechanisms.

Item (vii)

Rights conferred pursuant to law or contract [such as] or [by virtue of] concessions, licenses, authorisations, and permits

31. Rights such as concessions, licenses and permits are generally meant to cover rights to search for, cultivate, extract or exploit natural resources. Most bilateral treaties, and the ECT, refer to rights conferred by law or under contract and extend protection to such rights. One delegation considered that this item covers public law contracts.

32. Most delegations preferred to keep concessions in the definitions and to require reservations by any country wishing to discriminate in granting concessions. Some delegations were of the opinion that the issue of the granting of concessions should be kept outside the definition of investments.

33. Some delegations indicated that certain aspects of concessions raised issues related to monopolies in general and to cross-border government procurement, which might require some special provision or clarification in the MAI. One delegation submitted a note on this matter [DAFFE/MAI/RD(96)55]

34. Further work will be necessary, bearing in mind that some delegations believe it is necessary to determine whether the rights conferred by virtue of concessions, or the concession as such, are separate elements under the definition of investment.

35. One delegation points out that the granting of authorisations, licences and concessions in both the petroleum and fisheries sectors involve measures relating to the conservation and management of natural resources. In the petroleum sector it also involves the exercise of property rights over hydrocarbon resources. The conservation and management of the living resources in the exclusive economic zone is regulated in the United Nations Convention on the Law of the Sea of 1982. The management of hydrocarbon resources is inter alia regulated in the Energy Charter Treaty and in the EU Directive on the conditions for the granting and use of authorisations for the prospection, exploration and production of hydrocarbons. This directive is incorporated into the Treaty establishing the European Economic Area. In the view of the delegation, these issues fall outside the mandate for the negotiation of the MAI.

Item (viii)

Any other tangible and intangible, moveable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges.

Negative List

Item [(i) public debt;] [debt securities of and loans to a state enterprise or Contracting Party;]

36. Some delegations consider that sovereign debt should not be part of the definition of investment, while others believe that including sovereign debt (which includes state-owned enterprise debt) requires further consideration. One element to be considered in this respect would be the sovereign liquidity issue. Some delegations pointed out that confiscatory measures by a debtor state entail international responsibility which should be dealt with in the MAI.

Item [(ii) financial assets;]

[unless the transactions [to which such debt or other assets relate] otherwise have the characteristics of an investment; or]

[unless the respective claims are assets of an enterprise mentioned in paragraph (a) (i); or]

[unless such assets are acquired for the purpose of establishing lasting economic relations with an enterprise; or]

Item [(iii) derivatives where the underlying asset is not regarded as an investment],

37. These items are under review by EG5.

Item [(iv) real estate or other property, tangible or intangible, not acquired in the expectation or used for the purpose of economic benefit or other business purpose]

Item [(v) movable or immovable property, and any related rights acquired for personal use];

38. Real estate is a common form of property protected under BITs, the ECT and NAFTA. There are different views on how to treat summer residences or second homes. NAFTA excludes real estate or other property which is not acquired in the expectation, or used for the purpose, of economic benefit or other business purposes, and some delegations prefer such an approach which is reflected in item [iv].

-- Other Elements

39. Some delegations consider that the MAI should include “returns, or “reinvested returns” as part of the definition of investment as in the ECT.

Annex B

Safeguard provisions in other international agreements

1. Balance of payments

GATS

Article XI

Payments and Transfers

1. Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.
2. Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement, provided that a Member shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article XII or at the request of the Fund.

Article XII

Restrictions to Safeguard the Balance of Payments

1. In the event of serious balance-of-payments and external financial difficulties or threat thereof, a Member may adopt or maintain restrictions on trade in services on which it has undertaken specific commitments, including on payments or transfers for transactions related to such commitments. It is recognized that particular pressures on the balance of payments of a Member in the process of economic development or economic transition may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development or economic transition.
2. The restrictions referred to in paragraph 1:
 - (a) shall not discriminate among Members;
 - (b) shall be consistent with the Articles of Agreement of the International Monetary Fund;
 - (c) shall avoid unnecessary damage to the commercial, economic and financial interests of any other Member;
 - (d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;
 - (e) shall be temporary and be phased out progressively as the situation specified in paragraph 1 improves.

3. In determining the incidence of such restrictions, Members may give priority to the supply of services which are more essential to their economic or development programmes. However, such restrictions shall not be adopted or maintained for the purpose of protecting a particular service sector.

4. Any restrictions adopted or maintained under paragraph 1, or any changes therein, shall be promptly notified to the General Council.

5. (a) Members applying the provisions of this Article shall consult promptly with the Committee on Balance-of-Payments Restrictions on restrictions adopted under this Article.

(b) The Ministerial Conference shall establish procedures¹⁵ for periodic consultations with the objective of enabling such recommendations to be made to the Member concerned as it may deem appropriate.

(c) Such consultations shall assess the balance-of-payment situation of the Member concerned and the restrictions adopted or maintained under this Article, taking into account, *inter alia*, such factors as:

(i) the nature and extent of the balance-of-payments and the external financial difficulties;

(ii) the external economic and trading environment of the consulting Member;

(iii) alternative corrective measures which may be available.

(d) The consultations shall address the compliance of any restrictions with paragraph 2, in particular the progressive phaseout of restrictions in accordance with paragraph 2(e).

(e) In such consultations, all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance of payments, shall be accepted and conclusions shall be based on the assessment by the Fund of the balance-of-payments and the external financial situation of the consulting Member.

6. If a Member which is not a member of the International Monetary Fund wishes to apply the provisions of this Article, the Ministerial Conference shall establish a review procedure and any other procedures necessary.

NAFTA

Article 2104: Balance of Payments

1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures that restrict transfers where the Party experiences serious balance of payments difficulties, or the threat thereof, and such restrictions are consistent with paragraphs 2 through 4 and are:

(a) consistent with paragraph 5 to the extent they are imposed on other transfers than cross-border trade in financial services; or

¹⁵It is understood that the procedures under paragraph 5 shall be the same as the GATT 1994 procedures.

- (b) consistent with paragraphs 6 and 7 to the extent they are imposed on cross-border trade in financial services.

General Rules

2. As soon as practicable after a Party imposes a measure under this Article, the Party shall:
 - (a) submit any current account exchange restrictions to the IMF for review under Article VIII of the Articles of Agreement of the IMF;
 - (b) enter into good faith consultations with the IMF on economic adjustment measures to address the fundamental underlying economic problems causing the difficulties; and
 - (c) adopt or maintain economic policies consistent with such consultations.
3. A measure adopted or maintained under this Article shall:
 - (a) avoid unnecessary damage to the commercial, economic or financial interests of another Party;
 - (b) not be more burdensome than necessary to deal with the balance of payments difficulties or threat thereof;
 - (c) be temporary and be phased out progressively as the balance of payments situation improves;
 - (d) be consistent with paragraph 2(c) and with the Articles of Agreement of the IMF; and
 - (e) be applied on a national treatment or most-favored-nation treatment basis, whichever is better.
4. A Party may adopt or maintain a measure under this Article that gives priority to services that are essential to its economic program, provided that a Party may not impose a measure for the purpose of protecting a specific industry or sector unless the measure is consistent with paragraph 2(c) and with Article VIII(3) of the Articles of Agreement of the IMF.

Restrictions on Transfers Other than Cross-Border Trade in Financial Services

5. Restrictions imposed on transfers, other than on cross-border trade in financial services:
 - (a) where imposed on payments for current international transactions, shall be consistent with Article VIII(3) of the Articles of Agreement of the IMF;
 - (b) where imposed on international capital transactions, shall be consistent with Article VI of the Articles of Agreement of the IMF and be imposed only in conjunction with measures imposed on current international transactions under paragraph 2(a);
 - (c) where imposed on transfers covered by Article 1109 (Investment - Transfers) and transfers related to trade in goods, may not substantially impede transfers from being made in a freely usable currency at a market rate of exchange; and

- (d) may not take the form of tariff surcharges, quotas, licenses or similar measures.

Restrictions on Cross-Border Trade in Financial Services

- 6. A Party imposing a restriction on cross-border trade in financial services:
 - (a) may not impose more than one measure on any transfer, unless consistent with paragraph 2(c) and with Article VIII(3) of the Articles of Agreement of the IMF; and
 - (b) shall promptly notify and consult with the other Parties to assess the balance of payments situation of the Party and the measures it has adopted, taking into account among other elements
 - (i) the nature and extent of the balance of payments difficulties of the Party,
 - (ii) the external economic and trading environment of the Party, and
 - (iii) alternative corrective measures that may be available.
- 7. In consultations under paragraph 6(b), the Parties shall:
 - (a) consider if measures adopted under this Article comply with paragraph 3, in particular paragraph 3(c); and
 - (b) accept all findings of statistical and other facts presented by the IMF relating to foreign exchange, monetary reserves and balance of payments, and shall base their conclusions on the assessment by the IMF of the balance of payments situation the Party adopting the measures.

OECD Codes of Liberalisation

Article 7

Clauses of derogation

- c. If the overall balance of payments of a Member develops adversely at a rate and in circumstances, including the state of its monetary reserves, which it considers serious, that member may temporarily suspend the application of measures of liberalisation taken or maintained in accordance with the provisions of Article 2(a).
- d. However, a Member invoking paragraph (c) shall endeavour to ensure that its measures of liberalisation:
 - i)* cover, twelve months after it has invoked that paragraph, to a reasonable extent, having regard to the need for advancing towards the objective defined in sub-paragraph *ii)*, transactions and transfers which the Member must authorise in accordance with Article 2(a) and the authorisation of which it has suspended, since it invoked paragraph (c); and
 - ii)* comply, eighteen months after it has invoked that paragraph, with its obligations under Article 2(a).

2. Monetary and exchange rate policies

NAFTA

Article 1410: Exceptions

2. Nothing in this Part applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party's obligations under Article 1106 (Investment - Performance Requirements) with respect to measures covered by Chapter Eleven (Investment) or Article 1109 (Investments - Transfers).

Article 1106: Performance Requirements

1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or
- (g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 1102 and 1103 apply to the measure.

3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

- (a) to achieve a given level or percentage of domestic content;

- (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;
 - (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
 - (d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.
4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.
5. Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs.
6. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:
- (a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
 - (b) necessary to protect human, animal or plant life or health; or
 - (c) necessary for the conservation of living or non-living exhaustible natural resources.

Article 1109: Transfers

1. Each Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay. Such transfers include:
- (a) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;
 - (b) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
 - (c) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;
 - (d) payments made pursuant to Article 1110; and
 - (e) payments arising under Section B.

2. Each Party shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer with respect to spot transactions in the currency to be transferred.

3. No Party may require its investors to transfer, or penalize its investors that fail to transfer, the income, earnings, profits or other amounts derived from, or attributable to, investments in the territory of another Party.

4. Notwithstanding paragraphs 1 and 2, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

- (a) bankruptcy, insolvency or the protection of the rights of creditors;
- (b) issuing, trading or dealing in securities;
- (c) criminal or penal offenses;
- (d) reports of transfers of currency or other monetary instruments; or
- (e) ensuring the satisfaction of judgments in adjudicatory proceedings.

5. Paragraph 3 shall not be construed to prevent a Party from imposing any measure through the equitable, non-discriminatory and good faith application of its laws relating to the matters set out in subparagraphs (a) through (e) of paragraph 4.

6. Notwithstanding paragraph 1, a Party may restrict transfers of returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement, including as set out in paragraph 4.

OECD Codes of Liberalisation

Article 7

Clauses of derogation

b. If any measures of liberalisation taken or maintained in accordance with the provisions of Article 2(a) result in serious economic and financial disturbance in the Member State concerned, that Member may withdraw those measures.