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

**Expert Group No.5 on “Financial Services Matters”**

**REPORT TO THE NEGOTIATING GROUP**

## **Report to the Negotiating Group**

1. I am pleased to report to the Negotiating Group on the results of the 13-14 March meeting of EG5 on Financial Services Matters. This report also contains the main results of earlier meetings of the Group.
2. The Group has prepared text, which it recommends for adoption, on the following matters:
  - Prudential measures;
  - Recognition arrangements;
  - Authorisation procedures;
  - Transparency;
  - Information transfer and data processing;
  - Membership of self-regulatory bodies and associations;
  - Definition of financial services;
  - Transfers (paragraph 4.6).

The Group noted that the proposed carve-out for prudential measures was of paramount importance to financial services. The Group also noted that some of these issues are of general application and accordingly invited the Negotiating Group to consider adopting text for the MAI as a whole. The placement of these provisions in the MAI also needs to be considered. In some cases, specific terms may need to be defined.

3. The Group has also advanced work on:
  - a) Access to payments and clearing systems/lender of last resort, and the role of monetary authorities;
  - b) A temporary safeguard clause for balance-of-payments and monetary/exchange rate policy reasons, including the role of the IMF;
  - c) Special provisions for financial services in the dispute settlement procedures; and
  - d) The treatment of public debt in the MAI.

These matters need further work with a view to finalising text.

4. The Group also considered proposals on “new financial services”, “right of initial establishment” and “equality of competitive opportunity” to bring into the MAI additional disciplines such as those developed in the GATS Understanding on Financial Services. While the Group agreed that the MAI should be a high standard investment agreement, no agreement could be reached on these issues. Three delegations wished to include in the MAI, at minimum, the GATS standards on market access and national treatment. They considered that failure to do so would give undue benefits to countries that might accede to the MAI without having accepted the disciplines of the GATS Understanding and could undermine upcoming negotiations on financial services in the WTO. Some delegations were of the view that market access issues were being discussed more broadly in the MAI negotiations and further consideration of

these issues should await the outcome of those discussions. Other delegations, however, considered that it would not be appropriate to extend the disciplines of the MAI to these additional market access obligations. These delegations considered that it was not necessary to repeat the GATS obligations in the MAI and that to do so would automatically, by virtue of the MFN principle in GATS, give undue benefits to countries that had not accepted the disciplines of the GATS Understanding.

5. The Group considered other issues particularly important or specific to financial services, including restrictions based on dotation capital of branches of financial services enterprises and “indirect investment” (investment controlled by MAI investors established in non-MAI countries).

6. Delegations shared a common understanding that the supply to the territory of a Contracting Party of services by non-resident (non-established) service providers is not intended to be covered by MAI provisions of National Treatment and MFN. (Of course, the MAI would require a Contracting Party to provide MFN and National Treatment to the operations of an establishment on its territory, including its consumption and provision of services.) This matter is of great importance to financial services and should be clarified in the text of the Agreement, possibly through an Interpretative Note.

7. The Group believes that further work is required in some areas of its mandate, in particular those identified in paragraph 3 above. In addition, it will be necessary to review the treatment of financial services in the light of further developments in the MAI. The Group would welcome the opportunity to undertake this work on behalf of the Negotiating Group and might direct its work in the near term to proposals related to a temporary safeguard clause.

8. Given the time constraint, it was not possible for the Group to discuss all aspects of the text of this Report. Delegations have since been given a brief opportunity to comment on this report after the meeting. However, the report has been finalised under the responsibility of the Chair.

Chair

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## **I. Prudential Measures**

1. The Group confirmed the recommendation contained in its December 1996 report [DAFFE/MAI/EG5(96)5] that the following text be adopted:

### “Prudential measures

1. Notwithstanding any other provisions of the Agreement, a Contracting Party shall not be prevented from taking prudential measures with respect to financial services, including measures for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by an enterprise providing financial services, or to ensure the integrity and stability of its financial system.
2. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Contracting Party's commitments or obligations under the Agreement.”

## **II. Financial Services Matters**

### ***1. Recognition arrangements***

2. The Group confirmed the recommendation contained in its December 1996 report [DAFFE/MAI/EG5(96)5] that the following text be adopted:

### “Recognition arrangements

1. A Contracting Party may recognise prudential measures of any other Contracting Party or non-Contracting Party in determining how the Contracting Party's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonisation or otherwise, may be based on an agreement or arrangement with the other Contracting Party or non-Contracting Party concerned or may be accorded autonomously.
2. A Contracting Party that is a party to such an agreement or arrangement referred to in paragraph 1, whether future or existing, shall afford adequate opportunity for other interested Contracting Parties to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement. Where a Contracting Party accords recognition autonomously, it shall afford adequate opportunity for any other Contracting Party to demonstrate that such circumstances exist.”

2. *Authorisation procedures*

3. Most delegations recommended adoption of the following text:

“Authorisation procedures

1. Each Contracting Party's regulatory authorities shall make available to interested persons their requirements for completing applications relating to an investment in, or the operations of, a financial services enterprise.

2. On the request of an applicant, the regulatory authority shall inform the applicant of the status of its application. If such authority requires additional information from the applicant, it shall notify the applicant without undue delay.

3. A regulatory authority shall make an administrative decision on a completed application of an investor in a financial services enterprise or a financial services enterprise that is an investment of an investor of another Contracting Party within [120][180] days, and shall promptly notify the applicant of the decision. An application shall not be considered complete until [all relevant hearings are held and] all necessary information is received. Where it is not practicable for a decision to be made within [120][180] days, the regulatory authority shall notify the applicant without undue delay and shall endeavour to make the decision within a reasonable time thereafter.”

Commentary

4. It was suggested that provisions on authorisation procedures may have a broader application than financial services. A few delegations felt that no such provisions are necessary as they considered that the provisions would not add to the basic obligations of the agreement.

3. *Transparency*

5. The Group recommended that, in addition to the general Transparency provisions of the MAI, the following text be adopted:

“1. Nothing in this Agreement requires a Contracting Party to furnish or allow access to:

- a) information related to the financial affairs and accounts of individual customers of financial services enterprises; or
- b) any confidential or proprietary information, the disclosure of which would impede law enforcement or otherwise be contrary to the public interest or prejudice legitimate commercial interests of particular enterprises.”

## Commentary

6. The Group also considered a provision proposed by one delegation calling for advance notification, to the extent practicable, to all interested persons of any measure of general application that the Contracting Party proposes to adopt which may affect the operation of the agreement, in order to allow an opportunity for such persons to comment on the measure. The text reads as follows:

“Each Contracting Party shall, to the extent practicable, provide in advance to all interested persons any measure of general application that the Contracting Party proposes to adopt which may affect the operation of the Agreement, in order to allow an opportunity for such persons to comment on the measure. Such measure shall be provided:

- a) by means of official publication;
- b) in other written form; or
- c) in such other form as permits an interested person to make informed comments on the proposed measure.”

While delegations agree to the value of prior consultation, a majority of delegations expressed concerns that the above proposed provision may be unduly burdensome, and would not be practical.

## **4. *Information transfer and data processing***

7. The Group recommended adoption of the following text<sup>1</sup>:

“1. No Contracting Party shall take measures that prevent transfers of information or the processing of financial information outside the territory of a Contracting Party, including transfers of data by electronic means, where such transfer of information or processing of financial information is:

- a) necessary for the conduct of the ordinary business of a financial services enterprise located in a Contracting Party that is the investment of an investor of another Contracting Party; or
- b) in connection with the purchase or sale by a financial services enterprise located in a Contracting Party that is the investment of an investor of another Contracting Party of:
  - i) financial data processing services; or
  - ii) financial information, including information provided to or by third parties.

2. Nothing in paragraph 1:

- a) affects the financial service enterprise’s obligation to comply with any record keeping and reporting requirements; or
- b) restricts the right of a Contracting Party to protect privacy, including the protection of personal data and the confidentiality of individual records and accounts, so long as such right is not used to circumvent the provisions of the Agreement.”

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<sup>1</sup> One delegation reserved its position.

## Commentary

8. The Group considered that this text may have a broader application than financial services and invited the Negotiating Group to consider this possibility.

9. It is the Group's common understanding that such provisions do not prejudice in any way the right of Contracting Parties to take prudential measures as provided by the prudential carve-out article [DAFFE/MAI(97)1, page 11].

10. One delegation provided comments (circulated after the March meeting as DAFFE/MAI/EG5/RD(97)10) on the reasons why the term "privacy" in paragraph 2 b) should be adopted, instead of the term "personal privacy" used in the GATS. Some delegations wanted to review this aspect of the text further.

## 5. *Membership of self-regulatory bodies and associations*

11. The Group recommended adoption of the following text:

"1. When membership or participation in, or access to, any self-regulatory body, securities or futures exchange or market, clearing agency, or any other organisation or association is required by a Contracting Party in order for investments of investors of any other Contracting Party in a financial services enterprise established in the territory of the Contracting Party to provide financial services on an equal basis with financial services enterprises of the Contracting Party, or when the Contracting Party provides directly or indirectly such entities, privileges or advantages in providing financial services, the Contracting Party shall ensure that such entities accord national treatment to such investments."

## Commentary

12. It is the Group's common understanding that these provisions do not prevent self-regulatory bodies and associations, including deposit insurance institutions, from applying the requirements of the relevant rules and regulations for access to membership as long these requirements are consistent with the provisions of this Agreement.

13. Most delegations supported the following interpretative note proposed by one delegation:

"Contracting Parties may meet their obligations on access to clearing systems for branches of financial services enterprises by providing indirect access, for example, through an enterprise incorporated in the territory of the Contracting Party concerned."

14. A few delegations wanted to review further the proposed interpretative note because they considered that it would impose a lesser standard than in the WTO. One delegation suggested adding to the interpretative note: "provided that such access provides equal opportunities".

**6. *Payments and clearing systems/Lender of last resort***

15. The Group noted that these issues were related to the role of monetary authorities and agreed to consider further the following text:

“1. Under terms and conditions that accord national treatment, each Contracting Party shall grant to financial services enterprises that are investments of investors of any other Contracting Party established in its territory access to payment and clearing systems operated by public entities, and to official funding and refinancing facilities available in the normal course of ordinary business.

2. The provisions of this Agreement are not intended to confer access to the Contracting Party's lender of last resort facilities.”

Commentary

16. Most delegations supported the following interpretative note proposed by one delegation:

“Contracting Parties may meet their obligations on access to clearing systems for branches of financial services enterprises by providing indirect access, for example, through an enterprise incorporated in the territory of the Contracting Party concerned.”

A few delegations wanted to review further the proposed interpretative note because they considered that it would impose a lesser standard than in the WTO. One delegation suggested adding to the interpretative note: “provided that such access provides equal opportunities”.

**7. *Definition of financial services***

17. The Group confirmed its recommendations for text contained in its December 1996 report [DAFFE/MAI/EG5(96)5] reproduced on page 84 of the Consolidated Text [DAFFE/MAI(97)1].

**8. *Other issues***

***a) New financial services***

18. Several delegations considered that owing to the rapid pace of innovation in the financial services sector, it is important to ensure that an investor in the host country can introduce a new service to that market and that, as there are not adequate points of comparison, relying on the National Treatment principle alone could effectively exclude a foreign-owned establishment from introducing new financial services. Therefore these delegations favoured the preparation of specific text.

19. Three delegations supported the introduction in the MAI of specific provisions concerning new financial services. The Group considered two options for text:

Option 1

“ A Contracting Party shall permit financial services enterprises of any other Contracting Party established in its territory to offer any new financial services.”

## Option 2

“A Contracting Party shall permit a financial services enterprise established in its territory that is an investment of an investor of any other Contracting Party to offer in its territory any financial service that is not offered in the territory of the Contracting Party but which is offered in the territory of another Contracting Party. A Contracting Party may determine the institutional and juridical form through which the service may be provided and may require authorisation for the provision of the service. Where such authorisation is required, a decision shall be made within a reasonable time and the authorisation may only be refused for prudential reasons”.

20. Most delegations questioned the need for specific provision and preferred to rely on the National Treatment provision of the MAI, possibly accompanied by an interpretative note.

### ***b) “Acquired rights”***

21. The Group considered suggestions made by one delegation that there may need to be provisions concerning the “acquired rights” of foreign financial services enterprises established in a Contracting Party [see DAFPE/MAI/EG5/RD(96)1].

22. Some delegations considered that it was unclear what the concept of “acquired rights” referred to. One delegation provided comments on this matter (circulated after the March meeting as DAFPE/MAI/EG5/RD(97)9). Delegations wished to give further consideration to these comments. Some delegations considered that this matter is linked to “standstill” and should be addressed in the general framework of the Agreement.

23. Other delegations considered that the inclusion of provisions on “acquired rights” could create distortions in the treatment of investors depending on the date of their respective establishment. Those delegations considered that a Contracting Party should have the ability to apply new regulations to all financial institutions operating on its territory so long as these regulations are consistent with the provisions of the Agreement.

### ***c) Right of initial establishment, equality of competitive opportunity and application of national treatment in sub-national units of government***

24. One delegation made proposals for text in these areas [DAFPE/MAI/EG5/RD(96)1]. A few other delegations expressed support for the proposal on right of initial establishment and equality of competitive opportunity.

25. Most delegations did not support adoption of text in these areas. They considered that these issues go beyond financial services issues and have been addressed or are under consideration within the broader framework of the Agreement. A few delegations considered that specific market access disciplines for financial services should be developed in the MAI.

### ***d) Restrictions based on dotation capital of branches of financial services enterprises***

26. One delegation proposed the following text:

“Some countries still require branches of foreign banks to maintain dotation capital. To the extent that dotation capital requirements are imposed on branches of banks of another Contracting Party, any operational restrictions based on capital applicable to branch offices shall

not be based on such dotation capital. Rather, Contracting Parties shall base such operational restrictions on the world-wide consolidated capital of the parent bank.”

Detailed comments explaining the rationale for this proposal are contained in paragraph 31 of the Aide-Mémoire in DAFFE/MAI/EG5/M(97)1.

27. While two other delegations supported this proposal, several delegations considered that the measures referred to in the above text were justifiable on prudential grounds and should be permitted under the MAI. Some delegations considered that the issue should preferably be dealt with on a bilateral basis (between national supervisory authorities).

28. Delegations agreed that any such measures should not discriminate between branches of non-resident financial institutions and domestic financial institutions.

*e) “Indirect investment”*

29. One delegation expressed concern that the extension of the protection of the MAI to indirect investment may not be appropriate for the financial services sector for prudential reasons, particularly in instances where there is a lack of appropriate co-operation arrangements with the supervisory authorities of non-MAI countries [DAFFE/MAI/EG5/RD(97)7].

30. A number of delegations wanted to consider the matter further. Other delegations considered that the MAI provided safeguards to adequately address these concerns, including the prudential carve-out, the proposed denial-of-benefits clause, and possible specific provisions for financial services in the dispute settlement process (see below).

### **III. Role of Monetary Authorities**

#### ***1. Transactions in pursuit of monetary and exchange rate policies***

31. The Group agreed to consider further the following text:

“1. Articles XX<sup>2</sup> and YY<sup>3</sup> do not apply to transactions carried out in pursuit of monetary or exchange rate policies by a central bank or monetary authority of a Contracting Party.

2. Where such transactions do not conform with Articles XX and YY, they shall not be used as a means of avoiding the Contracting Party’s commitments or obligations under the Agreement.”

#### **Commentary**

32. Most delegations wanted to consider this issue further, including in particular whether the transactions referred to in paragraph 1 should be explicitly limited to: 1) open market transactions in government securities; and 2) foreign exchange intervention transactions. Some delegations considered that there should be a broad carve-out for activities conducted in pursuit of monetary or exchange rate policies by a central bank or monetary authority.

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<sup>2</sup> Article on National Treatment and Most Favoured Nation Treatment [DAFFE/MAI(97)1, page 41].

<sup>3</sup> Article on Transparency [DAFFE/MAI(97)1, page 11].

33. The Group also considered a text which would preserve the freedom of the monetary authority to decide not to carry out transactions with foreign non-residents but which would prevent the monetary authority from discriminating against resident (established) foreign investors when choosing the counterpart of a transaction. This text would be added at the end of paragraph 1. It would read as follows:

“... with investors or their investments which are not legal persons constituted or organised under the applicable law of the Contracting Party or with natural persons who do not have the nationality of, or who are not permanently residing in the Contracting Party in accordance with its applicable law”.

Some delegations considered that such an addition would not be appropriate. Other delegations wished to reflect further on this matter.

34. One delegation asked whether restrictions on the sale of financial instruments to non-residents falls under the above provisions or under the temporary safeguard clause (see below). In response, it was said that under the above provisions the monetary authority would be free to determine whether or not to sell instruments to non-residents, while restrictions imposed by the authorities on the sale by residents other than the monetary authority to non-residents should fall under the safeguard clause.

## **2. *Other issues***

### **1. *Privatisation***

35. One delegation stated that it might privatise its monetary authority. In this case it might want to ensure that this institution would continue to be nationally controlled even after privatisation.

36. Most delegations, however, saw no need to make a specific provision in the MAI for this possibility, preferring to rely on the general provisions of the MAI on privatisation. If necessary, a country reservation could be lodged.

### **2. *Proprietary actions of government***

37. Some delegations raised the issue of the relation of the MAI provisions to proprietary actions by governments. It was agreed that nothing in the Agreement should prevent a government from exclusively offering a particular service, such as activities: a) related to public retirement plans or statutory security systems: or b) for the account or with the guarantee or using the financial resources of a Party, including its public entities.

38. The Group is seeking further clarification on this matter and noted that specific provisions could be needed to carve-out such activities only if:

- a) the right to maintain or designate a monopoly as provided for in the Monopoly provisions of the MAI would not be applicable to such activities;
- b) a government of a Contracting Party, when engaging in operations on its territory on its own account, would be regarded as an investor of the Contracting Party in the sense of the MAI so that National Treatment should be granted to foreign investors wishing to engage in similar operations.

### ***3. Lender of last resort***

39. The Group agreed that the provisions of this Agreement are not intended to confer access to the Contracting Party's lender of last resort facilities and that this issue was best addressed in the context of the provision on access to payment and clearing systems (see above).

## **IV. Temporary Safeguard Clause**

40. The Group considered text for a temporary derogation clause for balance-of-payments reasons [DAFFE/MAI/EG5(97)3] and for capital movements that could cause serious difficulties for the operation of economic or monetary policy [DAFFE/MAI/EG5/RD(97)6]. The Group also considered an informal room document prepared by one delegation.

41. Most delegations agreed that such clauses should best be combined into a single safeguard clause providing temporary dispensation from disciplines of the MAI, subject to specific limitations and controls. Two texts were considered for this purpose [see Annex]. One delegation also made a proposal [see DAFPE/MAI/EG5/RD(97)8].

42. In addition, the IMF made a proposal concerning the role of the IMF in the dispute settlement process in case of invocation of the safeguard clause which reads as follows:

“If the dispute concerns Article A (Temporary Safeguards) or Article B (Obligations in the IMF), the panel shall consult with the Fund and accept its decisions as to consistency of the measures with its Articles of Agreement and its assessments made under paragraph[s] 1 [and 2] of Article A.”

43. The Group agreed that further work on these matters is needed to develop agreed text.

## **V. Dispute Settlement**

44. The Group considered two issues relating to dispute settlement. The first issue was whether specific provisions with respect to investor-state dispute settlement procedures are needed to avoid possible abuse of these procedures. The second issue related to the role of financial expertise in dispute settlement.

### ***A. Investor-State Dispute***

45. Several delegations supported adoption of specific provisions which, in situations where an investor of a Contracting Party has a claim against a measure taken by another Contracting Party, would require the two Contracting Parties to meet before this claim can go to the arbitration process. Among these delegations, two were of the view that such provisions should apply with respect to measures taken not only for prudential reasons but also pursuant to any monetary policy carve-out and temporary safeguard provisions. Other delegations supporting the proposal wanted to reflect further on whether such provisions should apply to measures other than those taken for prudential reasons.

46. Other delegations opposed the imposition of limitations on the ability of investors to resort to the investor-state dispute settlement and considered that no such specific provisions were needed .

47. The following text for such specific provisions was considered :

“1. Where an investor of a Contracting Party submits a claim under Article xx (Investor-State Procedures)] against another Contracting Party and the disputing Contracting Party invokes Article xx (Prudential Measures) [Article xx (Temporary Safeguards)] [Article xx (Role of Monetary Authorities)], on request of the disputing Contracting Party, the Tribunal shall refer the matter in writing to [the authority responsible for financial services in each of] the Contracting Parties involved in the dispute for a decision. The Tribunal may not proceed pending receipt of a decision or report under this Article.

2. In a referral pursuant to paragraph 1, the [authorities referred to in paragraph 1] [Contracting Parties] shall consult with each other to decide the issue of whether and to what extent Article xx (Prudential Measures) [Article xx (Temporary Safeguards)] [Article xx (Role of Monetary Authorities)], is a valid defence to the claim of the investor. The [authorities] [Contracting Parties] shall transmit a copy of their decision to the Tribunal [and to the Parties Group]. The decision shall be binding on the Tribunal.

3. Where the [authorities] [Contracting Parties] have not decided the issue within 60 days of the receipt of the referral under paragraph 1, the disputing Contracting Party or the Contracting Party of the investor may request the establishment of an arbitral panel under Article xx (Request for a State to State Arbitral Tribunal) to determine whether, and to what extent, Article xx (Prudential Measures) [Article xx (Temporary Safeguards)] [Article xx (Role of Monetary Authorities)], is a valid defence to the claim of the investor. The Tribunal shall be constituted in accordance with [Article xx (Financial Services Experts Tribunal)]. Further to Article xx (Final Report), the panel shall transmit its final report to the [authorities] [Contracting Parties] and to the Investor-State Tribunal. The report shall be binding on the Tribunal.

4. Where no request for the establishment of a State to State Tribunal pursuant to paragraph 3 has been made within 10 days of the expiration of the 60-day period referred to in paragraph 3, the Investor-State Tribunal may proceed to decide the matter.”

***B. Financial Expertise for Dispute Settlement***

48. The Group also considered the following additional text relating to the selection of panels:

“Selection of the Arbitral Panel

1. Where a Party claims that a dispute involves financial services matters, Article xx (Panel Selection) shall apply, except that:

(a) where the disputing Parties so agree, the tribunal panel shall be composed entirely of panellists meeting the qualifications in paragraph 2; and

(b) where the Contracting Parties do not agree that the panel be composed in accordance with (a),

(i) each disputing Party may select panellists meeting the qualifications set out in paragraph 2 or in Article xx (Qualifications of Panellists), and

- (ii) if the Party complained against invokes Article xx (prudential measures), the chair of the panel shall meet the qualifications set out in paragraph 2.

2. Financial services experts shall:

- (a) have expertise or experience in financial services law or practice, which may include the regulation of financial institutions;
- (b) be chosen strictly on the basis of objectivity, reliability and sound judgement; and
- (c) be independent of, and not be affiliated with or take instructions from, any Party.”

49. Time did not allow the Group to resolve these matters

50. The Group reaffirmed the need for provisions which would require financial expertise for panels dealing with financial services issues. The Group recalled that most delegations were of the view that financial service expertise should be required for any arbitration panel for disputes on issues relevant to financial services [DAFFE/MAI/EG5(96)5 and DAFPE/MAI(97)1]. Some delegations considered that the possibility of such expertise is already provided for under the general dispute settlement provisions now under consideration. Other delegations recommended adoption of specific provisions similar to those included in the GATS Annex on Financial Services which read as follows: “panels for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial services under dispute” [see also DAFPE/MAI/EG5/RD(97)5].

## **VI. Public Debt**

51. The Group considered the appropriate treatment of public debt under the MAI on the basis of written contributions by two delegations [DAFFE/MAI/EG5/RD(97)1 and DAFPE/MAI/EG5/RD(97)3].

52. Most delegations agreed that public debt should be fully covered by the MAI disciplines<sup>4</sup>, except with respect to rescheduling. One delegation agreed to prepare a text for further consideration.

53. Several delegations were of the view that countries whose public debt management may not be consistent with the provisions of this Agreement should deal with this situation through reservations. Other delegations wanted to consider this matter further.

54. The issue of state enterprise debt may also require further consideration.

## **VII. Transfers Article (paragraph 4.6)**

55. At the invitation of the Negotiating Group, EG5 reviewed the square-bracketed text for paragraph 4.6 of the MAI Article on Transfers contained in the Consolidated Texts and Commentary DAFPE/MAI(97)1 as a result of earlier work by Drafting Group No.1 on “Selected topics concerning investment protection”.

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<sup>4</sup> Some delegations reserved their position on the inclusion of public debt within the scope of MAI disciplines.

56. Most delegations recommended adoption of the following text for paragraph 4.6 of the Article on Transfers:

“4.6. Notwithstanding Articles 4.1 to 4.5, a Contracting Party may prevent a transfer through the equitable, non-discriminatory and good faith application of measures to protect the rights of creditors, relating to or ensuring compliance with laws and regulations on the issuing, trading and dealing in securities, futures and derivatives, reports or records of transfers, or in connection with criminal offences and orders or judgements in administrative and adjudicatory proceedings, provided that such measures and their application shall not be used as a means of avoiding the Contracting Party’s commitments or obligations under the Agreement.”

#### Commentary

57. This text has been developed at the request of the Negotiating Group for the MAI Article on Transfers as a whole. The Group considered that such provisions are particularly important for financial services. A few delegations felt that no such provisions are necessary.

## ANNEX

This annex reproduces text in relation to temporary safeguards for balance-of-payments and monetary/exchange rate policy reasons which has been considered by EG5 at its meeting on 13-14 March 1997.

### **Room text:**

#### **Article A. Temporary Safeguard Clause**

1. A Contracting Party may adopt or maintain measures otherwise inconsistent with its obligations under this Agreement, including restrictions on payments or transfers under Article xx<sup>5</sup> into and out of its territory:
  - (a) in the event of serious balance-of-payments and external financial difficulties or threat thereof;  
or
  - (b) where, in exceptional circumstances, movements of capital cause, or threaten to cause, serious difficulties for the operation of its economic or monetary policy.
2. The restrictions referred to in paragraph 1:
  - (a) shall not discriminate among Contracting Parties and shall be consistent with Article yy<sup>6</sup> with respect to the treatment of investors of other Contracting Parties, and their investments, established in the territory of the Contracting Party;
  - (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 Contracting Party;
  - (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.

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<sup>5</sup> This refers to the Transfers Article of the MAI which can be found on page 41 of the Consolidated Texts and Commentary [DAFFE/MAI(97)1].

<sup>6</sup> This refers to the National Treatment Article 1.1 of the MAI which can be found on page 11 of the Consolidated Texts and Commentary [DAFFE/MAI(97)1].

3. With respect to circumstances described in paragraph 1 (b), the Contracting Party may adopt or maintain restrictions only on the acquisition or sale of investments with an initial maturity of less than one year and for a period not exceeding six months.

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

5. (a) Contracting Parties applying the provisions of this Article shall consult promptly with the Parties Group on restrictions adopted under this Article.

(b) The Parties Group shall establish procedures for consultations with the objective of enabling such recommendations to be made to the Contracting Party concerned as it may deem appropriate.

(c) Such consultations shall assess the balance-of-payments situation of the Contracting Party 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 financial environment of the consulting Contracting Party;

(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).

6. In the consultations under paragraph 5, 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 Contracting Party. Restrictions [adopted or maintained under paragraph 1] that are approved by the International Monetary Fund in the exercise of its jurisdiction shall be considered as consistent with this Article.

### **Article B. Obligations in the International Monetary Fund**

1. Nothing in this Agreement shall be regarded as altering the obligations undertaken by a Contracting Party as a Signatory of the Articles of Agreement of the International Monetary Fund.

#### **Commentary on Article A**

1. As worded, paragraph 1 would cover measures affecting both underlying transactions and transfers, and both capital outflows and capital inflows.

2. Some delegations felt that paragraph 1 (a) should apply only to transfers. Other delegations suggested that the clause should not allow the imposition of restrictions on compensation from expropriation. One delegation submitted a specific proposal to limit the scope of the Safeguard provision [DAFFE/MAI/EG5/RD(97)8]

3. Paragraph 5 b) leaves open the precise modalities of the procedures for consultations and recommendations to follow in cases of invocation by a Contracting Party of the b.o.p. derogation clause. These modalities would have to be determined by the Parties Group. It was noted that according to the WTO Understanding on the Balance-of-Payments provisions of the GATT 1994, consultations are to be held within four months after the adoption of the measures; under the GATT 1994 consultation procedures, the IMF provides documentation, normally a WTO Recent Economic Developments document including statistics covering the balance-of-payments. The IMF comments on the background paper prepared by the Secretariat prior to its distribution, and its own documentation is circulated with all the other relevant documentation three weeks before the meeting of the Committee on Balance-of-Payments Restriction. The IMF then makes a formal statement in the meeting of the Committee.

4. One delegation suggested that the Article should provide for a further review of the restrictions every six months so long as the restrictions remain in place. Other delegations expressed concern that such a provision may contradict the requirement that restrictions should be only temporary.

5. The Group also considered a possible additional paragraph to Article A which read as follows: “ If the Parties Group determines, [by consensus minus one] [a two-thirds majority] that the measures adopted or maintained by the consulting Contracting Party [are not justified] [ do not comply with the provisions of this Article], the measures shall not be continued beyond [ninety] days”. Several delegations expressed concern that such a provision would give the Parties Group an enforcement role which would be better left to the dispute settlement procedures. In such procedures a role for the IMF remains to be considered.

#### **Text proposed by two delegations:**

#### **Article A. Temporary Safeguard Clause**

1. A Contracting Party may adopt or maintain measures inconsistent with
  - its obligations under Article xx<sup>7</sup> with regard to transfers into and out of its territory;
  - Article yy<sup>8</sup> with regard to National Treatment for the acquisition or sale of investments;
  - [Article zz<sup>9</sup> with regard to the right to deposit money on accounts abroad]
    - (a) in the event of serious balance-of-payments difficulties or threat thereof; or
    - (b) where, in exceptional circumstances, movements of capital cause, or threaten to cause, serious difficulties for the operation of its economic or monetary policy.

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<sup>7</sup> This refers to the Transfers Article of the MAI which can be found on page 41 of the Consolidated Texts and Commentary [DAFFE/MAI(97)1].

<sup>8</sup> This refers to the Article on National Treatment and Most Favoured Nations Treatment

<sup>9</sup> This refers to the Article on Performance Requirements

2. The restrictions referred to in paragraph 1:
  - (a) shall, with regard to transfers, provide NT and MFN;
  - (b) shall be consistent with the Articles of Agreement of the International Monetary Fund;
  - (c) shall not exceed those necessary to deal with the circumstances described in paragraph 1;
  - (d) shall be temporary, be reviewed every [six] months, and be eliminated as soon as conditions permit;
  - (e) shall be promptly notified to the Parties Group.
3. Restrictions [adopted or maintained under paragraph 1] that are approved by the International Monetary Fund in the exercise of its jurisdiction shall be considered as consistent with this Article.
4.
  - (a) Contracting Parties applying the provisions of this Article shall consult promptly with the Parties Group on the implications of the restrictions adopted under this Article for its obligations under this Agreement.
  - (b) The Parties Group shall, with regard to measures not falling within paragraph 3, establish procedures for consultations with the objective of enabling such recommendations to be made to the Contracting Party concerned as it may deem appropriate.
  - (c) The consultations shall address the compliance of any restrictions with paragraph 2, in particular the elimination of restrictions in accordance with paragraph 2 (d).
  - (d) In such consultations, the assessment by the IMF of the conditions mentioned under paragraph 1 and the consistency of any restrictions with paragraphs 2 (a) to 2 (d) shall be accepted by the Parties Group.
  - (e) In the consultations under this paragraph, the Parties Group shall approve, in full or in part, these measures or make other recommendations.
5. Measures approved either by the IMF or the Parties Group cannot be subject to dispute settlement.
- [6. The provisions of this Article cannot be invoked with regard to transfers of the amounts of compensation due under Article zz (*expropriation*).]

### **Article B. Obligations in the International Monetary Fund**

1. Nothing in this Agreement shall be regarded as altering the obligations undertaken by a Contracting Party as a Signatory of the Articles of Agreement of the International Monetary Fund.

#### **Commentary on Article A**

1. Some delegations stated that they could only accept paragraph 2 (a) if the question of Regional Economic Integration Organisations is sufficiently addressed within the MAI.
2. It is understood that the application of such measures is subject to the normal dispute settlement provisions. In such dispute settlement procedures the role and expertise of the IMF should be ensured.