



Negotiating Group on the Multilateral Agreement on Investment (MAI)

Informal Consultations on Financial Services Matters

REPORT TO THE NEGOTIATING GROUP

Report to the Negotiating Group

1. In addition to the report contained in DAFPE/MAI/EG5(97)4/REV1, I am pleased to report on results of the informal consultations among financial experts held on 14-15 March 1997.
2. These discussions focused on four issues:
 - a) a temporary safeguard clause, including the role of the Fund;
 - b) the treatment of public debt in the MAI;
 - c) the role of monetary authorities with regard to transactions in pursuit of monetary and exchange rate policies; and
 - d) special provisions for financial services in the dispute settlement procedures.
3. These consultations resulted in draft text on a temporary safeguard clause and on a provision concerning the rescheduling of public debt. These texts need to be reviewed in capitals and will require further refinement.
4. A number of Delegations favoured a carve-out provision for transactions carried out in pursuit of monetary or exchange rate policies, but different views remain on its scope.
5. A majority of delegations favoured special dispute settlement provisions to deal with prudential matters and other issues concerning financial services.
6. Financial experts are ready to pursue their informal consultations if the Negotiating Group would find this useful. They recommend that these and other financial services issues be reconsidered by financial experts at the appropriate time.

Chair

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I. TEMPORARY SAFEGUARD PROVISIONS

Article A

1. A Contracting Party may adopt or maintain measures inconsistent with¹
 - its obligations under Article xx² (Transfers);
 - Article yy³, para 1.1 (National Treatment) for [cross-border capital transactions as it relates to non-resident investors and investments]:
 - (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 [economic,]⁴ monetary or exchange rate policies.
2. Measures referred to in paragraph 1:
 - [(a) shall provide MFN treatment;]
 - [[(b) shall with regard to transfers also provide National Treatment, except as provided in paragraph 1];]⁵
 - (c) shall be consistent with the Articles of Agreement of the International Monetary Fund;
 - (d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;
 - (e) shall be temporary and shall be eliminated as soon as conditions permit;
 - (f) shall be promptly notified to the Parties Group and International Monetary Fund, including any changes in such measures.
3.
 - (a) Measures referred to in paragraph 1 and any changes therein shall be subject to review and approval or non-approval within six months of their adoption and every six months thereafter until their elimination.
 - (b) These reviews shall address the compliance of any measure with paragraph 2, in particular the elimination of measures in accordance with paragraph 2 (e).

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1. It was recognised that the MAI provisions on performance requirements, which are still under discussion, could have implications for the scope of this paragraph.
 2. This refers to the Transfers Article of the MAI [DAFFE/MAI(97)1, page 41].
 3. This refers to the Article on National Treatment and Most Favoured Nation Treatment [DAFFE/MAI(97)1, page 11]
 4. As a compromise, one delegation suggested “macro economic” policies instead of “economic” policies.
 5. Delegations are reviewing the need for paragraph 2a) and b) in the light of the scope of the measures permitted by paragraph 1.

4. Measures [referred to in paragraph 1] that are approved by the International Monetary Fund in the exercise of its jurisdiction shall be considered as consistent with this Article.

5. (a) The Parties Group shall, with regard to measures not falling within paragraph 4, [establish review procedures to] consider the implications of the measures adopted under this Article for the obligations of the Contracting Party concerned under this Agreement.

(b) [In such reviews,] the Parties Group shall request an assessment by the Fund of the conditions mentioned under paragraph 1 and [may/shall] request an assessment by the Fund of the consistency of any measures with paragraphs 2 (a) to (e). Any such Fund assessment shall be accepted by the Parties Group.

(c) Unless the Fund determines that the measure is either consistent or inconsistent with the provisions of this Article, the Parties Group may either approve or disapprove the measure. [The Parties Group shall establish procedures for this purpose.]

(d) The Contracting Parties shall seek agreement with the Fund regarding the role of the Fund in the review procedures established under this Article.

6. Measures approved by the Fund in the exercise of its jurisdiction or determined to be consistent with this Article by the Fund or the Parties Group cannot be subject to dispute settlement.⁶

[7. The provisions of this Article cannot be invoked with regard to transfers of the payments of compensation due under Article zz (*expropriation*).]

Article B. Obligations under the Articles of the Agreement of the International Monetary Fund

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.⁷

Commentary

1. Some Delegations questioned the need to allow for a derogation from National Treatment.

2. In paragraph 1 a), the words “and external financial difficulties” can be found in the GATS. It is understood that inclusion of these words narrows the scope of the safeguard clause. A few delegations wished to review further the meaning of the phrase “and external financial difficulties.”

3. One delegation reserved its position on the role of the Fund with respect to paragraph 1(b).

6. The dispute settlement provisions would apply if the measure actually applied differed from that approved or determined to be consistent with this Article. The Fund shall be consulted in any such proceedings involving a measure that the Fund approved or found to be consistent with this Article.

7. The coverage of this article would include, for example, cases where the Fund would request the imposition of capital controls in accordance with the Fund’s Articles of Agreement.

4. Some delegations wish to review further the relationship between this safeguard clause and the Fund Articles of Agreement because an extension of the Fund's jurisdiction is under consideration.

5. Regarding paragraph 3 a), the Fund representative proposed that there should be flexibility in the timing of reviews, for example, for countries implementing a Fund-supported programme, in order to coincide the review under the MAI safeguard article with a scheduled review by the Fund's Executive Board of the policies under the programme.

6. In paragraph 5 c), one delegation suggested that decisions by the Parties Group to approve or disapprove a measure shall be made by consensus minus one.

7. Concerning paragraph 7, one delegation proposed an alternative text which reads:

“The provisions of this Article cannot be invoked with regard to direct investment, proceeds from the sale or liquidation of a direct investment, compensation from expropriation and from strife, returns on direct investment and unspent earnings of personnel engaged from abroad in connection with an investment”.

Many Delegations preferred to delete paragraph 7 entirely so as not to qualify the scope of the safeguard article.

8. With respect to panel consultations with the Fund in the context of Dispute Settlement, the Fund representative proposed inclusion of the following text:

“If the dispute concerns Article A (Temporary Safeguards) or Article B (Obligations in the Fund), 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.

It was agreed that this proposal needs to be discussed.

II. PUBLIC DEBT

a) *Public Debt rescheduling*

9. There was general agreement that public debt rescheduling should fall outside the MAI disciplines. The financial experts considered a draft provision submitted by some delegations which reads as follows:

“The [rescheduling] of the debts [loans] of a Contracting Party or its appropriate institutions [owed to another Contracting Party or its appropriate institutions and the related [rescheduling] of its debts [loans] owed to [private] investors] will not be subject to [the provisions of this Agreement].”

10. It was agreed that the issue of trade insurance and export credit guarantees still needs to be addressed.

11. A footnote could be added to explain the meaning of “appropriate institutions”.

12. One delegation considered that the obligation of MFN treatment needs to be preserved in the context of public debt rescheduling.

13. Some delegations wished to review whether the carve-out should apply to rescheduling of all public debt, or only to debts owed to other Contracting Parties and to private creditors whose claims were linked to the rescheduling of state-to-state debt.

14. Some delegations continued to reserve their position on the inclusion of public debt within the scope of MAI disciplines.

b) *Public debt management*

15. Most delegations remained of the view that, with the exception of the proposed carve-out for debt re-scheduling, public debt should be fully covered by the MAI disciplines. Situations where country public debt management policies may not be consistent with the MAI provisions can be covered by country-specific reservations. A few delegations, however, expressed concern over this approach and considered that public debt management should be totally excluded from the scope of the MAI.

III. TRANSACTIONS IN PURSUIT OF MONETARY AND EXCHANGE RATE POLICIES

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

“1. Articles XX⁸ and YY⁹ 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

17. 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.

18. 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.

19. 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.

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

9. Article on Transparency [DAFFE/MAI(97)1, page 11].

IV. DISPUTE SETTLEMENT

A. *Determination of Certain Financial Services Issues in Investor to State Proceedings*

20. Delegations considered whether the MAI should provide for a special procedure, in investor to state proceedings, to determine whether certain financial services measures (specifically, prudential measures, temporary safeguards and actions taken by a monetary authority) are consistent with the MAI.

21. Some delegations believe that the decision of a Contracting Party to invoke prudential measures, and perhaps some other kinds of measures, should not be subject to the dispute settlement provisions of the MAI.

22. Some delegations believe that an investor to state panel should be free to decide all financial services issues. These delegations are concerned that a special provision dealing with certain financial services matters could lead to a call for special provisions in other areas.

23. The majority of delegations believe that MAI Parties should have a voice in the question of whether a prudential measure, and perhaps a temporary safeguard or action by a monetary authority, is consistent with the MAI. These delegations hold the view that there must be a balance between the interest of an investor in pursuing its remedies under the MAI and the need for stability in financial markets.

24. To this end, the following text was put forward:¹⁰

“1. Where an investor of a Contracting Party submits a claim under Article D (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

10. An alternative text has also been proposed, under which a special panel of financial experts, consisting of 10 or perhaps 15 members, would decide by consensus or consensus minus one whether a Contracting Party, in the case of a prudential measure, temporary safeguard or action taken in pursuit of monetary or exchange rate policy, has acted in accordance with the MAI [DAFFE/MAI/RD(97)25].

of Monetary Authorities)], is a valid defence to the claim of the investor. The Tribunal shall be constituted in accordance with [Article xx (see section A above on Composition of Dispute Settlement Panels in Financial Services Disputes)]. 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. Composition of Dispute Settlement Panels in Financial Services Disputes

25. Delegations agree that panellists in state to state and investor to state proceedings should have the necessary expertise relevant to prudential issues and other financial services issues when the dispute involves such an issue.

26. A majority of delegations believe that the MAI should contain a provision that requires or encourages Parties to appoint financial services experts as panellists in such disputes.

27. However, some delegations believe that the current dispute settlement provisions on appointments to panels, which would enable a disputing Party to appoint a financial expert to a panel if it so desired, are adequate. These delegations are concerned that a special provision on appointment of financial services experts might lead to calls for such provisions with respect to other areas of expertise.

28. While the Group has not reached agreement on the principle of a specific provision on appointment of financial services experts, and have not had an opportunity to discuss text in detail, two proposals for a provision have been put forward for consideration.

29. Under the first proposal, the MAI would contain a provision modelled after a provision in the GATS Annex on Financial Services, which reads 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.”

30. Under the second proposal, the MAI would contain a more nuanced text along the following lines:

“Selection of the Panel

1. Where a Party claims that a dispute involves financial [services] matters, Articles C.2 and D.7 as applicable (Panel Formation) 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 disputing 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 C.2.c or D.7.c as applicable (Qualifications of Panellists), and
- (ii) if the Party complained against invokes Article xx (Prudential Measures) [Article xx (Temporary Safeguards)] [Article xx (Role of Monetary Authorities)], 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.”