



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. The financial experts held informal consultations on 9-10 June 1997.
2. These consultations focused on five issues:
 - a) a temporary safeguard clause, including the role of the Fund;
 - b) the treatment of public debt in the MAI;
 - c) transactions in pursuit of monetary and exchange rate policies;
 - d) payment and clearing systems/lender of last resort; and
 - e) the dispute settlement procedures for financial services.
3. These consultations resulted in revised texts on some of these matters. These texts need to be reviewed in capitals and will require further refinement.
4. 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

Text

“Article A

1. A Contracting Party may adopt or maintain measures inconsistent with¹
 - its obligations under Article xx (Transfers);
 - [• Article yy, para 1.1 (National Treatment) for cross-border capital transactions as it relates to non-resident² investors and investments]³:
 - (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,] monetary or exchange rate policies.⁴
2. Measures referred to in paragraph 1⁵:
 - (a) shall be consistent with the Articles of Agreement of the International Monetary Fund;
 - (b) shall not exceed those necessary to deal with the circumstances described in paragraph 1⁶;
 - (c) shall be temporary and shall be eliminated as soon as conditions permit;

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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. One delegation expressed concern that the “resident/non-resident” concept is not used or defined in the MAI; it also noted that the definition of a “resident” may differ from one national jurisdiction to another. Another delegation noted that the term “cross-border transactions” was also meant to refer to transactions between residents and non-residents.
 3. Most delegations favoured this text. Some delegations, however, questioned the need to allow for a derogation from National Treatment. One delegation proposed a narrower derogation in respect of National Treatment: “Article yy, para 1.1 (National Treatment) for the acquisition of investments where the point of comparison for a foreign investor using foreign-sourced funds is a domestic investor using domestic-sourced funds”.
 4. Delegations held different view on including the reference to “economic” policies (in addition to monetary and exchange rate policies) which would provide for a broader National Treatment exception . One delegation considered that the scope of paragraph 1 (b) should be limited to capital inflows or deleted.
 5. It was agreed that measures referred to in paragraph 1 shall provide MFN treatment, and shall also provide National Treatment except as specifically provided in paragraph 1, but that it is not necessary or appropriate to include text to this effect. Two delegations considered that this matter may need to be reviewed later once it is known how similar situations will be addressed elsewhere in the MAI.
 6. One delegation suggested adding: “and shall provide for the least disruptive effect to the functioning of the Agreement”. Reference was also made in this context to the language in paragraph 2. (c) of Article XII of the GATS: “shall avoid unnecessary damage to the commercial, economic and financial interest of any other Member”.

- (d) 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 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 (c).
4. Measures referred to in paragraph 1 and any changes therein that are approved by the International Monetary Fund in the exercise of its jurisdiction shall be considered as consistent with this Article⁷.
- 5⁸. With regard to measures not falling within paragraph 4:
- (a) The Parties Group shall consider the implications of the measures adopted under this Article for the obligations of the Contracting Party concerned under this Agreement.
- (b) The Parties Group shall request an assessment by the Fund of the conditions mentioned under paragraph 1 and of the consistency of any measures with paragraph 2 (a) and [may/shall] request an assessment by the Fund of the consistency of any measures with paragraphs 2 (b) and (c). Any such assessment by the Fund 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.
6. The Contracting Parties shall seek agreement with the Fund regarding the role of the Fund in the review procedures established under this Article.

7. Two delegations wished to give further consideration to measures which do not fall within the purview of paragraph 1, but which are approved by the IMF in the exercise of its jurisdiction.

8. Some delegations wished to reflect further on paragraph 5 in the light of developments in respect of the Fund's jurisdiction over capital movements.

7. Measures referred to in paragraph 1 and any changes therein that are 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^{9 10}.

[8. 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.¹¹

9. 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 dispute settlement proceedings involving a measure that the Fund approved or found to be consistent with this Article, and the Fund's findings shall be accepted. In this context, 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. (See also footnote 7.)

10. One delegation suggested that the dispute settlement provisions cannot be initiated prior to the conclusion of the first review under paragraph 3(a) with regard to adoption of the initial measures and any changes therein. Some delegations wished to reflect further on this matter.

11. 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.

Commentary

1. 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”. Two delegations were of the view that the word “and” should be replaced by “and/or”.

2. Some delegations wished 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.

3. 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.

4. Concerning paragraph 8, 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 8 entirely so as not to qualify the scope of the safeguard article.

II. PUBLIC DEBT

a) *Public debt rescheduling*

5. The majority of delegations remained of the view that public debt should be covered by the MAI disciplines. However, there was general agreement that public debt rescheduling should fall outside the MAI disciplines. For this purpose, delegations considered several proposals.

6. Under the first proposal, the MAI would include a provision which reads as follows:

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

7. One delegation suggested adding the following two interpretative notes to this text:

-- “The rescheduling of the debts” includes debt reduction;

-- “The debts of a Contracting Party or its appropriate institutions” includes the commercial debts covered by the guarantee of the Government of a Contracting Party or its public sector and the debts as far as the corresponding payments in local currency have been deposited.

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

9. Under the second proposal, one delegation proposed alternative language to the above text, which reads as follows:

“Reorganisation of debts due by a Contracting Party to another Contracting Party or its appropriate institutions, including the related obligations of comparability of treatment between all creditors, whether public or private, shall prevail over the terms of this Agreement.”

10. The term “reorganisation of debts”, which is meant to be broader than rescheduling and to include in particular refinancing, would need to be defined. One delegation suggested defining it as “changes in the terms and conditions applying to debts”. Any definition would also need to identify the range of bilateral and multilateral debt rescheduling agreements which would be covered by the proposed provision and their implications for third parties.

11. Some delegations considered that the MAI obligations to which debt rescheduling/reorganisation would not be subject should be clearly identified. One delegation considered that the obligations of MFN treatment and Transparency need to be preserved in the context of public debt rescheduling [DAFFE/MAI/RD(97)30].

12. Under the third proposal, one delegation suggested that “there might be an alternative approach to the current text’s sweeping exclusion of rescheduled public debt. This approach would add an interpretative note to the definition of “investment” that would make clear that:

-- consistent with international law and practice, particularly as related to treaties with provisions on investment, MAI obligations (e.g., on expropriation, transfers, treatment) do not apply to a government’s failure to pay on government debt or government-guaranteed debt;

- breach of a debt agreement does not in itself constitute a breach of any of the provisions of the MAI (e.g., expropriation, transfers, treatment); and
- public debt does not include government obligations to pay for goods and services purchased from an investor.

The interpretative note would provide guidance for tribunals in both state-to-state and investor-to-state arbitration. The interpretative note would be accompanied by an express exclusion of public debt and government-guaranteed debt from the “investment agreement” provision of investor-to-state dispute settlement.”

13. Another issue was the range of public debt to be covered by any carve-out for public debt rescheduling, including whether government debt securities, in addition to loans, should be covered. 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. It was also agreed that the issue of trade insurance and export credit guarantees still needs to be addressed.

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.

16. One delegation suggested that this issue may be related to privatisation.

III. TRANSACTIONS IN PURSUIT OF MONETARY AND EXCHANGE RATE POLICIES

17. The Group considered further the following text:

“1. Articles XX (National Treatment), YY (Most Favoured Nation Treatment) and ZZ (Transparency) 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 (National Treatment), YY (Most Favoured Nation Treatment) and ZZ (Transparency), they shall not be used as a means of avoiding the Contracting Party’s commitments or obligations under the Agreement.”

Commentary

18. While some delegations questioned the need for any specific provisions carving out transactions by a central bank or monetary authority in pursuit of monetary and exchange rate policies, most delegations would support adoption of this text¹².

19. One delegation made a proposal for a narrower carve-out that would substitute for the text in paragraphs 1 and 2 above [see DAFFE/MAI/FS/RD(97)1]. Under this proposal, the transactions referred to in paragraph 1 would be limited to open market transactions in securities and foreign exchange intervention transactions, and the central bank or monetary authority would be subject to the non-discrimination disciplines with respect to foreign investors established on its territory. Selection by a central bank or monetary authority of a counterparty in an individual transaction would not be subject to dispute settlement, but systematic discrimination could be challenged under the dispute settlement system. The majority of delegations considered that such a narrowing of the carve-out would not be appropriate. Some delegations were prepared to consider a narrow carve-out and considered that this proposal deserves further consideration before reaching a firm conclusion.

20. It was suggested that the need for specific provisions carving out transactions by a central bank or monetary authority in pursuit of monetary and exchange rate policies should be assessed in the broader context of the MAI as a whole. It was also suggested that such assessment should consider the extent to which transactions by a central bank or monetary authority may be carved-out in the GATS taken as a whole [see for instance the various options considered in DAFFE/MAI/EG5/RD(97)6], taking account of the fact that the GATS does not contain investor-to-state dispute settlement provisions as in the MAI.

12. 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. In response, it was said that under the above provisions the central bank or 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 central bank or monetary authority to non-residents should fall under the safeguard clause.

IV. PAYMENTS AND CLEARING SYSTEMS/LENDER OF LAST RESORT

21. Delegations noted that these issues were related to the transactions by a central bank or monetary authority in pursuit of monetary and exchange rate policies. They considered 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

22. 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”.

23. One delegation opposed the proposed interpretative note. The same delegation proposed an amended text for paragraph 1 which reads as follows: “ Under terms and conditions that accord national treatment, each Contracting Party shall grant to financial services enterprises supervised by recognised supervisory authorities that are investments of investors of any other Contracting Party established in its territory direct 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”.

24. In connection with paragraph 2, one delegation considered that in setting rules for access to lender-of-the-last resort facilities, a Contracting Party should accord National Treatment to foreign-controlled financial institutions established on its territory, unless they operate in the form of a branch.

V. DISPUTE SETTLEMENT

25. Delegations considered draft text on the application of dispute settlement with respect to financial matters without prejudice to the question of whether special procedures should be included in the MAI for financial matters.

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

26. Delegations considered the following text¹³.

“Article A

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 (Transactions in Pursuit of Monetary and Exchange Rate Policies) [Article xx (Temporary Safeguards)], on request of the disputing Contracting Party, the Tribunal shall refer the matter in writing to [the appropriate financial authority in each of] the Contracting Parties involved in the dispute for a decision¹⁴. 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 (Transactions in Pursuit of Monetary and Exchange Rate Policies) [Article xx (Temporary Safeguards)], is a valid defence to the claim of the investor. The [authorities] [Contracting Parties] shall transmit a copy of their common 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 60¹⁵ 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 (Transactions in Pursuit of Monetary and Exchange Rate Policies) [Article xx (Temporary Safeguards)], is a valid defence to the claim of the investor. The Tribunal shall be constituted in accordance with [Article xx (see Article B below 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], to the Investor-State Tribunal and to the Parties Group. The report shall be binding on the Tribunal.

13. 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].

14. Two delegations suggested adding at the end of this sentence the following text: “, unless the investor rejects this request within 20 days”. Some delegations considered that such an addition would undermine the purpose of a special dispute settlement regime for financial matters.

15. One delegation considered that 60 days may be too short a period to decide the issues in question.

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.”

Alternative to paragraphs 3 and 4 (proposed by one delegation)

3. Where the [authorities] [Contracting Parties] have not decided the issue within 60 days of the receipt of the referral under paragraph 1, the Investor-State Tribunal may proceed to decide the matter.”

Commentary

27. A majority of delegations considered that the MAI should provide for a special procedure, in investor to state proceedings, to determine whether certain financial measures are consistent with the MAI. These delegations hold the view that there must be a balance between the interests of an investor in pursuing remedies under the MAI and the need for stability in financial markets. Most of these delegations agreed that such measures should include prudential measures and transactions by a central bank or monetary authority. A few delegations were of the view that they should also include temporary safeguard measures.

28. 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 unduly delay the settlement of disputes and could lead to a call for special provisions in other areas.

29. 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.

B. Composition of Dispute Settlement Panels in Financial Services Disputes

30. Delegations considered two proposals for text.

31. 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:

“Article B

Panels for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial services under dispute.”

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

“Article B

Selection of the Panel

1. Where a Party claims that a dispute involves financial [services] and monetary 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 (Transactions in Pursuit of Monetary and Exchange Rate Policies) [Article xx (Temporary Safeguards)] 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.”

Commentary

33. 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.

34. 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.

35. 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.

36. Some delegations wished to consider possible refinement to the language in paragraphs 2. (b) and (c) in the light of the general provisions on Dispute Settlement.

37. Subsequent to the informal meeting, one delegation submitted the following proposal: “Financial services could be added in the articles C.5 and D.13 of the agreement [pages 57 and 65 of DAF/MAI(97)1/REV2] concerning scientific and technical expertise in the way that in addition to environmental, health, safety or other scientific or technical matters a written report of a review board may be requested also on financial services. So the necessary expertise relevant to the financial services would be guaranteed and no special procedure would be needed”. This proposal was not discussed.